The Central Law Journal.

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CURRENT EVENTS.

POACHERS ON PROFESSIONAL PRESERVES.—Our Canadian brethren are just now somewhat excited about certain persons whom they figuratively style "poachers on professional preserves," which, being interpreted, seems to mean notaries, justices and other scriveners. A correspondent of the *Canada Law Times* (March 15, 1886), complains bitterly of an enterprising notary whose trades seem to be as numerous as Pooh-Bah's offices. He advertises "cash paid for oats," "money to loan," and—here he touches the profession, "to write deeds, mortgages, etc., carefully, neatly, and cheaper than can be done elsewhere." The practical question at once arises: What are our Canadian brethren "going to do about it?" The fashionable remedies of "strike" and "boycott" are manifestly unavailable, and Parliament has most unpardonably neglected to protect the solicitor against the notary and the justice. There seems to be no help for the "fee-paying" lawyer, as the *Canada Law Journal*, editorially, calls him. Surely in this there must be some mistake—the editor must mean "fee-paid," not "fee-paying" lawyer.

It is hardly creditable to the profession in Canada, that it should clamor for protection against notaries and justices, in the matter of clerical work, which one man of ordinary intelligence can do as well as another. We would suggest, however, one point of consolation. The old adage says that he who is his own lawyer has a fool for his client; there are other fools like unto him, and among them is he whose chosen lawyer is no lawyer at all. The notary or other amateur may safely fill up blank forms, and dabble in the *minima* of the law, but if he ventures into deeper matters, as he very often does, he invariably makes trouble for his client, business for the regular courts, and fat fees for the lawyers. "The whirligig of time brings in its revenges." The fee for writing a deed or will, lost by an attorney through the parsimony of the grantor or testator, and the underbidding of a notary, may and often does, return to the profession, after many days, multiplied a hundred fold, in the shape of retainers in a law suit for the construction of the instrument.

DISSENTING OPINIONS.—We concur very heartily with the views of the *Albany Law Journal*, in its issue of the 27th ult., on the announcement and publication of dissenting opinions. We can hardly do more than express our cordial approval of our contemporary's opinion, for in its short article of less than a column, is stated very nearly everything that can be said in deprecation of the practice; we may add, however, that the great value of a ruling by a court of last resort, is its finality. It settles, or should settle, for all time to come, the law upon the point in question. It is desirable, of course, that the law as declared by the courts should be just and right, but it is even more important that it should be certain. If, as the court has declared the law, it is wrong or inexpedient, it is for the legislature to change or amend it; until that is done, it should, although even absurd, be received as the law of the land without question. That cannot be, the ruling cannot be respected, at home or abroad, when it appears in the newspapers and the reports, that the conclusion was reached by a vote of five to four, and the dissenting opinion is as long, and apparently as able as that of the majority, for "the clerk can read the Scripture as loud as the parson."

The dissenting opinion is usually a rehash of the brief of the defeated counsel, and that of the majority of the court necessarily expresses the views of the victor, so that in the report, the combatants fight their battles over again by their judicial champions, in the pages of the law books. It is not seemly, nor does it induce respect for a tribunal whose fallibility is so emphatically indicated by the dissensions of its members. Besides this, when the question is, in the slang of the day, a "burning" one, and important interests are likely to be affected by the continued operation of the ruling, and the personal views of the several judges are known and expressed, men will begin to speculate upon the probable constitution of the court, when an aged

member of it shall have died, or another has been retired by the expiration of his term, and who will be the successor, and what influences can be brought to bear upon the appointing or electing power. All this is as it should not be. We submit, somewhat diffidently, however, that so far from permitting or encouraging judges to deliver long-winded dissenting opinions, it should be part of the judicial oath of office, to keep inviolate the secrets of the consultation room. Such an oath would be at least as appropriate and useful as the oath of secrecy administered to a grand jury.

NOTES OF RECENT DECISIONS.

EVERY PRISONER HIS OWN WITNESS.—The legislation which for years past has reformed the law of evidence has, in our opinion, in one respect at least, overstept the mark. To confer upon a prisoner, tried for a felony, the privilege of testifying on his own behalf is to bestow upon him a boon of very doubtful value, and it may well be questioned whether the practice tends to the furtherance of justice or the developement of the truth. The law which authorizes a prisoner to testify upon his trial, places him under a moral duress, compelling him to do so, under the penalty, if he declines, of the most damaging suspicious on the part of the jury,as well as of the public. It is true that the law may say, and the judge may charge, that the jury must not infer from his silence anything to the disadvantage of the prisoner; but the jury will act under the law of human nature which is in this respect a higher law than the law of the land. They will think, and say to each other, that if he was not guilty he would have sworn to his innocence, and there is no law so stringent, and no judge so august as to prevent them from so thinking and so saying. If to avoid this horn of the dilemma, he chooses to encounter the other, and enter the witness box it avails him very little, his testimony is at best, of but little value, generally absolutely worthless, for the jury, still acting under the higher law of common sense, will say that if he is guilty of crime of which he is accused he will not hesitate to add perjury to it. In any event his deliverance must come *aliunde*.

Besides this the average defendant in criminal cases is "unaccustomed to public speaking," and by no means in the habit of arranging his ideas in logical sequence, or expressing them in apt terms. Under the literally and metaphorically, "trying" circumstances of a trial for a felony, it would not be remarkable that he should "lose his head" and say things that could easily be construed into a confession of guilt. That sort of thing has often happened. Many a man has tied a rope around his neck with his tongue. Flustered and frightened, agitated by the novel circumstances, under which he is placed, awed by the solemnity of the proceeding, and anxious beyond measure as to the grave consequences of an error, it is not remarkable that in every point of view he does himself much more harm than good, and, whether innocent or guilty, gives testimony the direct tendency of which is to convict, not to acquit him. He is in a position almost identical with that of the wretches of olden times to whom the wisdom of the law denied the aid of counsel, and who, whether old or young, learned or ignorant, male or female, were obliged to defend their lives by their own eloquence.

The truth is, there are but two words which a person, accused of serious crime, should, if he is well advised, say upon the subject, from the hour of his arrest to the rendition of the verdict, and those two words are "not guilty."

All this is *apopos* of a recent case in Nevada,[1] in which a defendant charged with larceny, essayed to testify in his own behalf, and made a mess of it. He was convicted, but luckily for him, the judge of the trial court had misdirected the jury, that: "The actions of the defendant are a safer foundation from which to draw a conclusion as to his intention at the time of the alleged taking than any subsequent declarations in his own favor." This, the Supreme Court held to be error, that the jury should have been instructed that they must draw their conclusions, as to the guilt or innocence of the prisoner, from the whole testimony taken to-

[1] State v. Maynard, S. C. Nev. Feb. 8, 1886; West Coast Reporter, p. 248.

gether, his own as well as that of other persons. The Supreme Court further held, that the trial court could not instruct the jury as to the relative weight of different classes of testimony, and that, "such a charge is a decision upon a question of fact."

In commenting on the case of Regina v. Jarrett, one of the malodorous *Pall Mall Gazette* cases, the *Law Journal* of London points out another anomaly created by this line of legislation. It says: "One fact can clearly be gained from the first trial on an extended scale in which prisoners have given evidence on their own behalf, namely, that criminal trials will be much longer in the future. A most important question remains as yet undealt with, namely: Ought a prosecution for perjury to follow the trial of a case in which a prisoner has given evidence wnich is untrue? If, in the present state of the low, such a prosecution should take place, a curious result would follow. On the trial for perjury the same facts would be in issue as at the trial under the Criminal Law Amendment Act, but the prisoner could not give evidence. His evidence in the witness-box n the previous occasion would be good evidence against him, but not in his favor; and he cannot give fresh evidence, because the change does not yet apply to perjury. This result is one of the evils of piecemeal legislation."

The *Law Journal* thinks that further legislation on the subject is called for, our own opinion is that the proper course is to retrace the steps taken in that direction, and hereafter to proceed *super antiquas vias*.

LEVY OF EXECUTION—WHEN VOID—BREAKING DOORS—RIGHTS AND LIABILITY OF SHERIFF.—It would naturally be supposed that by this time the law on the right of the sheriff to break open doors in the execution of civil process, and the consequences of any deviation from his duty in this respect would have been definitively settled. The leading case on this subject is Semayne's case,[2] in which it is held that a sheriff has no right in the execution of process of that character to break into a dwelling house, but there is an intimation that although his act in making the seizure is unlawful the levy may be valid. This last proposition has not met with universal acception, and indeed the weight of authority is against it. The Supreme Court of Minnesota has recently found it necessary to go into that question in the case of Welsh v. Wilson,[3] and decides that "The fact that one transacts his business in the building that is his dwelling, does not divest it of its character as a dwelling, so as to make it lawful for an officer to break the outer door for the purpose of serving civil process against the owner. No valid levy can be made by means of breaking into the dwelling of the defendant in the writ. Where the sheriff makes an unlawful levy, and is sued for the trespass, it cannot be taken in mitigation of damages that, pursuant to such levy, he sold the goods, and paid the proceeds to the execution creditor." In deciding the case the court thus states briefly the fact of the case and the grounds of its ruling: Plaintiff occupied in Waseca a building one story high, of only one room. In this she, with her daughter, slept; and did upon a kerosene stove what cooking she did, but usually got their meals at a restaurant. In it she also pursued her trade as a milliner, and kept in it for sale, and exposed for sale, a stock of millinery goods. It was fitted up like a store, with shelves, tables for counters, show-cases on the tables, and one in front, on and in which her goods were kept for sale. The defendant, sheriff of the county, having an execution against her property, went, about 10 o'clock in the morning, to the building, the door of which was then locked, put his hand through the window, a pane of which was broken, took the lock off the door, entered, and levied on and removed her goods.

The validity of the levy is only in question. The room must be taken to have been plaintiff's dwelling—her abode—not merely when closed to business, but at all times while she occupied it for her dwelling. The fact that she also used it to transact her business, did not change its character in that respect. It being her dwelling, it was unlawful for the sheriff to break the outer door to effect an entrance for the purpose of serving civil process. This proposition has never been

[2] 5 Coke Rep. 91 (b).

[3] 24 N. W. Rep. 327

doubted, either in England or in this country. It is also well settled in this country—there being no authority to the contrary—that no valid levy can be made by means of such unlawful entry. We may, perhaps, regret that such is the rule; may be able to see that unfortunate consequences will sometimes result from it; but it is too firmly established to be disturbed except by act of legislature. The levy being invalid, nothing which the sheriff did pursuant to it was valid. Every subsequent act based on the levy, and depending on it for its lawfulness, was but a continuation and aggravation of the original trespass. It can therefore be of no avail to the sheriff that he sold the goods and paid the proceeds to the execution creditor. In the cases where, as in Howard v. Manderfield,[4] such subsequent appropriation has been allowed to operate in mitigation of damages, there has been a subsequent valid levy, not connected with the trespass, which gave validity to the sale and appropriation of the proceeds.

Upon the authority of the Year Book 18 Edw. IV., fol. 4, pl. 19, the rule is thus stated in Semayne's case: "By Littleton and all his companions it is resolved that the sheriff cannot break the defendant's house by force of a *fieri facias*, but he is a trespasser by the breaking, and the execution which he then doeth in the house is good."[5] In a New York case there is a very elaborate examination of the question whether or not the execution which the sheriff "doeth" after an unlawful entry if good.[6] In that case the sheriff, having illegally broken into the house, was resisted when he attempted to carry off the goods he had seized, and the parties who resisted were indicted for an assault and battery. It was held that the sheriff might in case be lawfully resisted. It follows, of course, that if the officer could be lawfully resisted, his seizure of the goods must needs be invalid. This point was directly decided in Ilsley v. Nichols,[7] by Shaw, Ch. J., after a thorough examination of all the authorities ancient and modern. In that case it was held that the attachment of goods, made by the means of an unlawful breaking, was unlawful and invalid. The Supreme Court of Minnesota was clearly right in holding that the seizure of goods consequent upon an illegal entry was equally illegal, and in the further proposition that such seizure was an aggravation of the original trespass. It is a little remarkable, how long an error, which has been sanctioned by such great names in the law as Coke and Mansfield,[8] will survive its repeated refutation.

[4] 31 Minn. 237.
[5] Semayne's Case, 5 Coke, 91 (b).
[6] People v. Hubbard, 24 Wend. 369.
[7] 12 Pick. 270.
[8] See Lee v. Gansell, Cowp. 1.

HANDWRITING AS EVIDENCE OF IDENTITY.

There has been a remarkable change in recent times in the views of judges as to the weight to be given to the evidence afforded by handwriting. Lord Eldon laid it down, at the commencement of the present century, that, "by the common law, comparison of hands is not evidence."[1] And even in the ecclesiastical courts, where such evidence was often received, it was looked upon with a good deal of suspicion. Sir John Nicholl declared it to be very inconclusive, both on account of the exactness with which handwriting may be imitated, and also "from the dissimilarity which is often discernable in the handwriting of the same person under different circumstances." Few persons, he thought, wrote so uniformly that dissimilar formations of particular letters were grounds for concluding them not to have been made by the same person.[2] Dissimilarity in handwriting, he pointed out on another occasion, may be occasioned by a variety of circumstances—the state of health and spirits of the writer, his writing materials, his position, and his hurry or care.[3]

Of late, however, there has been a disposition to attach considerable weight to the evidence afforded by comparison of handwriting. It will be remembered that in the Tichborne trial the late Lord Chief Justice devoted no little attention to this subject. In his summing up he reserved the subject of handwriting as the last head of inquiry, and intro-

[1] Eagleton v. Kingston, 8 Ves., at p. 475.
[2] Robson v. Roche, 2 Addam's Rep. 79.
[3] Constable v. Steibel, 1 Hagg. Eccl. Rep. 61.

duced it to the jury as being a test "of more than of usual cogency, and one by which they might be safely guided." And he added that "manifold as are the points of difference, in the infinite variety of nature, in which one man differs from another, there is nothing in which men differ more, than in handwriting; and when a man comes forward and says, 'You believe that such a person is dead and gone: he is not; I am the man,' if I knew the handwriting of the man supposed to be dead, the first thing I should do would be to say, 'Sit down and write, that I may judge whether your handwriting is that of the man you assert yourself to be.' If I had writing of the man with whom identity was claimed, I should proceed at once to compare it with the handwriting of the party claiming it." The meaning of this seems to be that the one unchanging characteristic of a man in his handwriting. It is to be observed, however, that in the course of the summing up considerable modifications were introduced in this doctrine. In comparing the handwriting of the claimant with that of Arthur Orton, it was found that at least five of the capital letters in most common use were altogether differently formed. The learned judge then suggested that "in the course of several years the defendant altered the form in which he made those letters. "I take it to be the fact that, while the general character of the handwriting remains the same, persons do, in the course of time, change the manner of forming particular letters." Again, with regard to the letters undoubtedly written by the genuine Roger Tichborne, the awkward fact presented itself that, while the earlier letters were written in a "small, cramped hand," the later ones were in a "full, flowing hand." But the Lord Chief Justice was again ready with an explanation. Admitting that the two hands were very different, he pointed out that "the form of the most striking letters is to be found in the earlier writing," and that while it was true that handwriting altered in course of time, yet it had always the foundation of the early habit of writing, whatever might be the modifications introduced into it in the course of time. The general result of these observations seems to be that, in the opinion of a judge who was well known to have devoted special attention to the subject, a man's handwriting may change, but you can always trace a certain general resemblance between his earlier and later handwriting.

In the recent Lovat Peerage case this question of the weight to be attached to handwriting as evidence of identity was a good deal discussed. The claimant traced his descent from from Alexander Fraser of Wales, whom he sought to identify with Alexander Fraser, the eldest son of Thomas of Beaufort, who was the fourth son of the ninth Lord Lovat. It was proved that Alexander of Beaufort had signed a bond in 1684, and his signature to this document was closely compared by the learned law lords with the signatures of Alexander of Wales in certain mine-books. The result of the examination was to convince them that the two handwritings could not have been those of the same person. The signature of Alexander of Beaufort (1684) Lord Blackburn said, was "a bold well-written signature of an educated man," whereas that of Alexander of Wales, in 1737, was of a different character. "It would be difficult," Lord Blackburn said, "to select two writings which were less alike. * * * He considered that evidence of the handwriting was as strong evidence as could be given." And, according to the *Times* report, Lord Bramwell remarked that "the difference in the handwriting showed clearly that the two Alexanders were different persons." Now, the claimant's case was that Alexander of Beaufort, having at an early age killed a fiddler at a feast, fled into Wales, and worked there for a great many years as a common miner. The suggestion that incessant hard labor, constant association with ignorant workmen, and long discontinuance of the habit of writing might operate to change the character of the man's handwriting, seems to have been noticed by Lord Blackburn, but it is difficult to ascertain from the reports we have seen of his judgment what weight he gave to it. Lord Bramwell's remark seems to involve the proposition that the same man never writes two wholly different hands.

It is worth while to inquire whether and how far the belief in the unchangeableness of a man's handwriting is well founded. It appears to us that, if entertained at all, it ought to be entertained only subject to some important qualifications. There is a period

in the life of most people during which the handwriting is unformed, and for the purpose of comparison, writing during this period should be excluded. We are constrained to say, as the result of some observation, that in some men this period lasts very long. There is a certain member of her Majesty's Privy Council who, although he must have covered reams of paper during the course of a busy life, never seems to have thought it necessary to acquire any formed style of handwriting. Being a person of strong will, it is quite conceivable that he may, even yet, some day resolve to write a decent and uniform hand, and if he makes that resolution he will unquestionably carry it out. But in that case what would become of the evidence of identity afforded by his handwriting? Suppose the late Dean of Westminster had devoted himself for a week to forming a hand which could be read, does any one doubt that he would have succeeded in his purpose, and that his style of (so-called) handwriting would have wholly changed? Again, it is obvious that physical changes in the hand or arm may occasion the adoption of a different handwriting. Disuse for a lengthened period of the habit of writing may conceivably lead to forgetfulness of the mode in which letters were formerly framed. Letters written in haste are apt to differ considerably from letters written with deliberation, and letters written with a fine pointed pen are often singularly unlike letters written with a quill pen. And, again, peculiarities in handwriting are apt to be dropped. There was a curious instance of this in the letters of the genuine Roger Tichborne. From a very early period he had adopted a habit of placing a dot over the letter "y" whenever it occurred at the end of a word, but in his letters after the year 1851 this peculiarity was entirely absent. For some reason or other he had abandoned the habit. This is, of course, an extreme instance of eccentricity, but there are few people without some peculiar habit in writing. We know, for instance, a learned and very distinguised Queen's Counsel, the chief characteristic of whose handwriting is the habit of crossing his "t's" over, instead of through, the vertical stroke. We know an eminent solicitor whose peculiarity is the horizontal tail which he adds to certain letters occurring at the end of words. But it is quite possible that these persons may drop these habits. Perhaps they may do so if they read these remarks.

The general results at which we arrive are, first, that no reliance can be placed on what we may call tricks of handwriting, or even on the formation of particular letters. The general character of a man's handwriting may afford such evidence; but, even as to this, caution is requisite to ascertain that the handwritings compared were written at or about the same date. We doubt whether it is safe to assume that any man will, throughout the whole of his life, retain even the same general character of handwriting. And, lastly, it may be questioned whether Lord Chief Justice Cockburn was right in his assertion that "there is nothing in which men differ more than in handwritng." We should be rather disposed to think that very many persons write alike. Lord Eldon, in his judgment in Eagleton v. Kingston[4] tells the following curious story:—"A deed was tried in Westminster Hall, stated to have been executed under circumstance throwing a good deal of blot on the persons who had obtained it. The solicitor, who was a very respectable man, said he felt satisfaction that there were respectable witnesses. One was Town Clerk of Newcastle and I was the other. I could undertake to a certainty that the signature was not mine, having never attested a deed in my life. He looked back to my pleadings, and was sure it was my signature, and, if I had been dead, would have sworn it conscientiously."—*Solicitor's Journal.*

[4] 8 Ves., at p. 476.

POWERS OF MUNICIPAL CORPORATIONS.

A late decision of the Supreme Court of Pennsylvania[1] among other things holds that the inhabitants of a municipality are the corporators, the officers thereof, are only public agents of the corporation, and their powers and duties are prescribed by the charter and statute. All persons dealing with them are

[1] Appeal of Whalen, 16 Pittsb. Leg. Jour. 113.

bound to know the extent of these powers. The agents, officers, or city council, of a municipality, cannot bind the corporation by any contract not within the scope of its powers. A municipality does not possess, and cannot exercise any other power than those granted in express words, and those necessarily or fairly implied in or incident to the powers expressly granted, and those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensible. Any fair, reasonable doubt as to the existence of power, is resolved by the courts against its existence in the corporation, and therefore denied.

This seems a concise statement of the law governing municipal corporations. But contemporaneous with this decision comes another from Judge Brewer, of the United States Circuit Court for the Eastern District of Missouri. In this decision, City of St. Louis v. The Steamboat Maggie P.,[2] there seems to be a variance with the prior decisions of the courts. The city of St. Louis, by her charter, is given control of the levee and harbor. The charter also makes it the duty of the city to keep the wharf and shore free from wrecks and obstacles, but does not make it a part of its public duty to pump out and raise vessels which sink at the levee. This decision holds, that where it owns a harbor boat, it may contract with owners of sunken vessels to pump them out and raise them, when such work will not interfere with the public service. That the city is estopped from denying its liability for breach of contract, even when it has made such contracts, and received compensation through an officer, who has no authority by ordinance specifically empowering him to so contract for doing this kind of service. Having received gain from such contracts, it does not lie in its mouth, to say now that there was no officer authorized by ordinance to make this kind of contract. It has been doing the work and making money out of it, and if it has now made an unfortunate contract, it cannot say "nobody was authorized." Judge Brewer lays down this rule:

"Generally speaking, when public duty does not interfere with private service, a city may make a valid contract for the use of its instrumentalities in the latter."

[2] 21 Cent. L. J. 374.

If this doctrine is correct, then a city can, in some cases, contract outside of the powers expressly conferred by its charter and by statute. But a municipality is a mere creature of the legislative will, and can exercise no power except such as the State has conferred on it. The powers it possesses are held in trust for the people of the municipality, and for the public generally. Its governmental and administrative powers, other than those conferred by statutory or constitutional enactment, which are self-executing, can only be exercised by appropriate ordinance.[3]

The inhabitants are the incorporators, and the officers, the public agents of the corporation, whose duties are prescribed by statute or by charter, which all persons must not only know, but are bound to know.[4] The measure of authority to be exercised by a municipality, except as to incidental powers, is prescribed by the charter or the general law,[5] and whenever a city oversteps its powers in contracting, it can enter the plea of *ultra vires*, setting up want of authority.[6]

Neither can corporate powers be delegated to subordinate officers.[7] When a city exercises franchises not conferred upon it, or does work under an unconstitutional law, it is not liable for damages that may result. Thus a city built a bridge under an unconstitutional law, and from negligence in the construction, it fell and caused damages.—The city was not liable.[8]

It is frequently the case that a city council takes steps to join in some public celebration, thus giving it their sanction; yet any damages that may arise cannot be imputed to the negligence of the municipal corporation, as such action on the part of the city council was *ultra vires*. A city council appointed a committee to make arrangements for a celebration. Said committee ordered the fire department to join the procession. In parading the streets, the hose cart ran over a person, who brought suit against the city for damages.

[3] Zanone v. Mound City, 103 Ill. 552; Little Rock v. Willis, 27 Ark. 572.
[4] Dillon Munic. Corp., § 457.
[5] Cooley Const. Lim., 233.
[6] Dillon Munic. Corp., § 457.
[7] Cooley Const. Lim., 249.
[8] Mayor v. Cunliff, 2 N. Y. 165; Board v. Deprez, 87 Ind. 509.

Held, that the municipal corporation was not liable, as their action in calling out the hose cart was not authorized by law.[9]

Neither is a city liable for injury caused by fireworks discharged by citizens, in violation of an ordinance, the council and city officers taking active part in the celebration.[10]

When the powers delegated to officers elected by public corporations are political or governmental, the relation of principal and agent does not exist, and the rule *respondeat superior* does not govern.[11]

The rule of liability of a city for the acts of an independent contractor, is, that for injuries occurring in the progress of work carried on by parties in that capacity, the contractor alone is liable. But this liability is limited to those injuries which are collateral to the work performed, and which arise from negligence or wrongful act of the contractor or his agents or servants. But when the work is necessarily dangerous, or when the obligations rest upon the city to keep the work in safe condition, this rule does not apply.[12]

A city is liable for the acts of its agents, when those acts are purely ministerial, and involve no exercise of governmental or political functions.[13]

So a municipal corporation, in possession of a public wharf, authorizing a railroad corporation to lay its track upon the wharf, is responsible for any damages resulting from the dangerous condition in which the railway company left the wharf. The city is bound to keep the wharf in suitable condition for use. Permitting the railway company to occupy it at a stipulated rent does not discharge the city from liability.[14]

It is a well recognized doctrine that where a thing not *malum in se* is authorized by the legislature, and is performed with due care and diligence, a city cannot be held for damages, according to the common law.[15]

The statute affords complete security to those complying with it, though the injury complained of, in absence of the statute, would be actionable by the common law.[16]

But that private rights might be secure, many of the States have a clause in their constitution which provides that "private property shall not be taken or damaged for public use without just compensation." "Or damaged" was added to the present Constitution of Illinois in 1870.[17]

The English statutes provide compensation for injuries occasioned by public improvement, the language used, being substantially the same as in many of the State Constitutions. The English courts have adopted the rule as found in some of the States.[18]

The English statute requires compensation to be made where property is "injuriously affected" which term the English courts construe as meaning "damaged."[19]

Notwithstanding a statute providing for public improvements, yet if the State Constitution provides a compensation for injury occasioned thereby, an action will lie for damages.[20]

The city is liable for damages whenever there is a physical disturbance of a right public or private which is enjoyed by the party in connection with his property, and by reason of which disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public.[21]

The duty imposed by the legislature upon the board of health, under the police power, to be exercised for the public good, is one of which the city has no special authority,

[9] Smith v. Rochester, 76 N. Y. 506.

[10] Ball v. Woodbine, 61 Iowa, 83; See Robinson v. Greenville (Ohio) 2 Am. L. J. 386.

[11] Summers v. Board Commissioners, 2 N. E. Rep. 725; Strosser v. City of Ft. Wayne, 100 Ind. 443.

[12] Tiffin v. McCormack, 34 Ohio St. 638; McCafferty v. Railroad, 61 N. Y. 178; Crawford v. Smith, 79 Ind. 308; Lowell v. Boston R Co., 23 Pick. 24; Robbins v. Chicago, 4 Wall. 457.

[13] Semple v. Vicksburg, Miss. Sup. Ct., 20 Cent. L. J. 497.

[14] City of Allegheny v. Campbell, Sup. Ct. Pa., 15 Pittsb. Leg. Jour. 334.

[15] Penny v. S. W. R. R. Co., 7 E. & B. 660; Hammersmith & City R. R. Co. v. Brand, L. R. 4 H. Lds. 171.

[16] Billinger v. N. Y. Cent. R. R. Co., 23 N. Y. 42.

[17] Art. 2, § 13.

[18] Chamberland v. West End London R. R. Co., 2 Best & Smith, 605; Beckitt v. Midland R. R. Co., L. R. 1 C. P. 241.

[19] Hall v. Bristol, L. R. 2 C. P. 322; E. & W. India Docks Co. v. Gattke, 3 McN. & G. 155.

[20] Harman v. Omaha, 23 N. W. Rep. 503; Rigney v. Chicago, 102 Ill. 76; Atlanta v. Green, 67 Ga. 386; Johnson v. Parkersburg, 16 W. Va. 402; Werth v. Springfield, 78 Mo. 107; Gottschalk v. Chicago R. R. Co., 14 Neb. 550; Denver v. Bayer, 7 Col. 113.

[21] Rigney v. Chicago, *supra*; Mason v. Harper's Ferry Bridge, 17 W. Va. 396; Reardon v. San Francisco, 5 W. C. Rep. 758; R. R. Co. v. Reinhackle, 15 Neb. 279; Spencer v. R. R., 23 W. Va. 407.

and is not liable for the manner in which such service is performed,[22] and an action for damages against the city for malfeasance of the board of health will not lie, unless given by statute.[23]

If a municipal corporation establish a public hospital to prevent the spread of contagious disease, and for the good of the public, it is not liable for the negligence of the servants of said hospital.[24] Nor is it liable for negligence of its fire department.[25] Neither is a municipal corporation liable for the negligence of its firemen in going to a fire. Firemen are not agents of the city, but are public officers, for the public at large, and the city is not responsible for their omissions.[26]

A city is not liable for the negligence of its policemen, for their duty is to see that the public peace is maintained.[27]

But if the duty to be performed is for the private advantage of the city, in which the State has no interest, then the city will be held liable for the wrongful or negligent acts of its agents, although it may not have entire control of the officers,[28] as in laying gas-pipes,[29] or keeping a wharf in good condition, of which it has possession.[30]

When a municipal corporation makes money out of any business, such as receiving tolls for water-works or gas-works, it becomes liable for the wrongful acts of its employes in that line.[31] The responsibility for the care and control of the streets belongs to the city, and if an officer in acting for the corporation in the discharge of his employment, damages a party the city is liable.[32] It must use and control its streets so as not to injure the property of others.[33]

The power to license as a means of regulating a business, implies the power to charge a fee therefor sufficient to defray the expense of issuing the license, and to compensate the city for any expense incurred in maintaining such regulation. But if the sum charged for license is in excess of what is necessary or proper for that purpose, it must be considered a tax, and the ordinance imposing it is therefore void.[34] An ordinance regulating the closing of business such as laundries, is reasonable and may be enforced.[35]

The right of a city to direct the cessation of labor, must necessarily prescribe the limits within which it shall be enforced, the same as a city can limit the boundaries within which no wooden building shall be constructed.[36]

The doctrine announced by the learned judge in St. Louis v. Steamboat Maggie P., *supra*, seems to be in the line of other decisions which makes it a precedent of sound authority. In the case of Toledo v. Cove,[37] it was held that the city was liable for injury to a laborer caused by the negligence of the superintendent of a cemetery owned by the city. In this case the city receives private advantage or profit by owning the cemetery which does not interfere with public duty. The same principle is recognized in the case of a town, being held responsible[38] for injury to a party which was occasioned in this wise. The town was running a farm for the support of its poor, and negligently permitted a ram to run at large, which injured a citizen. The political divisions as counties, townships and school districts are *quasi* corporations, and no action will lie against them by a private party for neglect of public duty, unless such right of action is expressly given by statute.[39]

[22] Dillon Munic. Corp., § 976.

[23] Fisher v. Boston, 104 Mass. 93; Hayes v. Oshkosh, 33 Wis. 318; Ogg v. Lansing, 35 Iowa, 495; Smith v. Rochester, 76 N. Y. 513; Richmond v. Long's Admr., 17 Gratt. 375; Maxmilian v. Mayor, 62 N. Y. 160; Welsh v. Rutland, 56 Vt. 228.

[24] Murtagh v. St. Louis, 44 Mo. 479; Sherbourne v. Yuba Co., 21 Cal. 113; Dargan v. Mobile, 31 Ala. 469.

[25] Robinson v. Evansville, 87 Ind. 334; Fisher v. Boston, *supra*; Heller v. Sedalia, 53 Mo. 159; Wild v. Mayor, (N. J.) At. Rep., Dec. 9, 1885.

[26] Wilcox v. Chicago, 107 Ill. 334; Hafford v. New Bedford, 16 Gray, 297; Maximilian v. Mayor, *supra*.

[27] Dillon Munic. Corp., § 975; Jewett v. New Haven, 38 Conn. 368; Elliott v. Philadelphia, 75 Pa. St. 342; Campbell v. City, 53 Ala. 527; Caldwell v. Boone, 51 Iowa, 687; Bowditch v. Boston, 101 U. S. 16; Pesterfield v. Vickers, 3 Cold. (Tenn.) 205.

[28] Baily v. Mayor, 3 Hill, 531.

[29] Scott v. Mayor, 1 H. & N. 59.

[30] Pittsburgh v. Grier, 22 Pa. St. 54; Fennimore v. New Orleans, 20 La. Ann. 124.

[31] Hand v. Brookline, 126 Mass. 324; Henly v. Mayor, 2 Cl. & F. 331.

[32] Kobs v. Minneapolis, 22 Minn. 159; Greencastle v. Martin, 74 Ind. 449.

[33] Thurston v. St. Joseph, 51 Mo. 510.

[34] *In re* Wan Yin, U. S. D. Ct. Ore., 22 Fed. Rep. 701.

[35] Soon v. Crowley, 5 Sup. Ct. Rep. 730.

[36] Barbier v. Connally, 113 U. S. 27.

[37] 20 Cent. L. J., 62.

[38] Moulton v. Scarboro, 71 Me. 267.

[39] Van Epps v. Commissioners, 25 Ala. 460; Larkin v. Saginaw Co., 11 Mich. 88; Bray v. Wallingford, 20

But when a county is conducting a business in the exercise of a duty to the corporation for its private interest or advantage, it is responsible for damages for negligence of its servants. A county[40] was held liable for the negligence of its servants in performing work on a county insane asylum.

There are cases when towns and counties are liable for neglect of duty when such liability is not expressly declared by statute.[41] When a special duty is imposed on a town, with its consent, expressed or implied, or a special authority is conferred on it by its request, it is responsible for the same liabilities for the neglect of its special duties, as private corporations would be, including liability for the wrongful neglect, as well as the wrongful acts of their officers or servants.[42]

Through all of these decisions that seem to be in conflict with the established rule, runs this central principle, that if a municipal corporation performs a duty for its private advantage or profit, without antagonizing any public interest, it is responsible for the wrongful negligence or wrongful acts of its agents or servants, and contracts made by it in this line of duty can be enforced.[43]

D. H. PINGREY,

Bloomington, Ills.

Conn. 416; Treadwell v. Commissioners, 11 Ohio St. 190; Hafford v. New Bedford, 16 Gray, 48.

[40] Hannan v. St. Louis Co., 62 Mo. 313.

[41] Oliver v. Worcester, 102 Mass. 489; Chisey v. Canton, 17 Conn. 475; Blodgett v. Boston, 8 Allen, 237.

[42] Bigelow v. Randolph, 14 Gray, 541.

[43] Chicago v. Sexton, 2 N. E. Rep., 263; S. C. 18 Chi. L. News 25.

EXPERT EVIDENCE—PHYSICIANS AND SURGEONS—PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE AFTER INJURY—DAMAGES.

LOUISVILLE, ETC. R. CO. v. FALVEY.

In the Supreme Court of Indiana, November, 1885.

1. The opinion of a physician as to the character and permanency of a personal injury is competent.

2. In examining an expert, counsel may assume the facts to be as he thinks they are, and ask for an opinion on those facts.

3. It is competent for a plaintiff injured by the negligence of another person to prove that he obeyed the directions of his physician.

4. One who is injured by the negligence of another is bound to use care to procure surgical aid, and also to prevent the aggravation of the injury, but the degree of care required is only ordinary care.

5. Where a passenger receives an injury in a collision caused by the negligence of the servants of a railroad company, and disease is excited or developed by such injury, the injury may be considered as the proximate cause of the disease.

6. It is proper to instruct the jury that if the result of the injury was to diminish the plaintiff's capacity to earn money, that fact should be taken into consideration in estimating damages.

7. A verdict will be set aside on the ground that the damages are excessive, only in cases where the damages are such as to induce the court to believe that the jury must have acted from partiality, prejudice, or corruption.

8. The declarations of an injured person, indicative of present pain are inadmissible.

Appeal from Tippecanoe circuit court.

Geo. W. Easley and *W. H. Russell*, for appellant; *Langdon & Gaylord* and *John F. McHugh*, for appellee.

ELLIOT, J. delivered the opinion of the court.

The appellee's complaint alleges that she was received as a passenger on one of the appellant's trains, and was injured in a collision caused by the negligence of the appellant's servants. The first question in logical order arises upon the rulings made on the admission of the testimony of Dr. R. M. O'Ferrall. We are satisfied that the appellant is not in a situation to successfully complain of these rulings, for it obtained all it properly asked upon this subject. This we say for the reason that the appellee consented that the appellant's motion to strike out the testimony might be sustained; to this the former objected and withdrew its motion, but, notwithstanding the withdrawal of the motion, the court, upon the request of the appellee, did strike out all of the testimony objected to by the appellant. As the latter received all it asked, it has no just grounds for complaint. A party seeking an opinion from an expert witness may assume in his hypothetical question such facts as he deems proved by the evidence. A recent author says, of such question: "If framed on the assumption of certain facts, counsel may assume the facts in accordance with his theory of them; it not being essential that he should state the facts as they actually exist." Rog. Exp. Test. 39. Another author thus states the rule: "It is the privilege of counsel, in such cases, to assume, within the limits of the evidence, any state of facts which he claimes the evidence justifies, and have the opinion upon the facts thus assumed." Lawson, Exp. Ev. 153. In the recent case of Quinn v. Higgins, 24 N. W. Rep. 482, the Supreme Court of Wisconsin said:

"The rule in that respect must be that, in propounding a hypothetical question to an expert, the party may assume as proved all facts which the evidence tends to prove, and the court ought not to reject the question on the ground that, in his

opinion, such facts are not established by a preponderance of the evidence. What facts are proved in the case, where there is evidence to prove them, is a question for the jury, and not for the court. The party has a right to the opinion of the expert witness on the facts which he claims to be the facts of the case, if there be evidence tending to establish such facts, and the trial judge ought not to reject the question because he may think such facts are not sufficiently established."

This court has often declared the rule in substantially the same language as that employed by the authors from whom we have quoted. Davis, v. State, 35 Ind. 496; Bishop v. Spining, 38 Ind. 143; Guetig v. State, 66 Ind. 94; Goodwin v. State, 96 Ind. 550; Nave v. Tucker, 70 Ind. 15; Elliott v. Russell, 92 Ind. 526, *vide* authorities cited pages 555-574.

The appellee's counsel had a right to assume such facts as they deemed proved, and it was for the jury, as we have many times decided, to determine whether the facts were or were not justly assumed. Goodwin v. State, *supra*, *vide* authorities cited page 561; Elliott v. Russell, *supra;* Vanvalkenberg v. Vanvalkenberg, 90 Ind. 433; Fulwider v. Ingels, 87 Ind. 417; Guetig v. State, *supra*. Some of the facts assumed in the hypothetical questions propounded to Dr. O'Ferrall were eliminated by the subsequent ruling of the court upon the appellee's motion to strike out part of his testimony, but enough facts remained to entitle his opinion to go to the jury, under the rule declared in the authorities to which we have referred. Where there are facts upon which an opinion may be properly based, it is not error to refuse to strike out the entire opinion, for such an opinion should go to the jury for what it is worth, although the elimination of some of the facts may weaken the value of the opinion. But if we are wrong in this view, still no harm resulted, for the same facts teslified to by Dr. O'Ferrall were substantially proved by other witnesses. Whatever view is taken of the ruling on Dr. Ferrall's testimony, no substantial harm was done the appellant. Strength is added to this view by the further fact that the court, in its instructions, in very clear and forcible terms, directed the jury to disregard that part of the testimony to which the appellant's motion to strike out was addressed. The question asked Dr. Hallihan was not answered, but other questions were substituted, and it is quite clear that no harm resulted from the bare asking of the question, even though it was an improper one. Dr. Burke was asked: "State to the jury what fact you observed, what, if any, experiments you made, and what you learned to be the now condition, or the then condition, of the eyes and ear and how it was done." We can perceive no objection to this question, for it surely is always competent to ask a medical witness what observations he made, and what was the condition of the patient he was called upon to examine. It makes no difference, so far as concerns the competency of the testimony, what the purpose of the examination was, although that fact might, perhaps, exert some influence upon the credibility of the witness. If the physician did in fact make an examination, his observations of the condition of the person examined by him are unquestionably competent. We have again and again decided that objections to testimony must be specifically stated to the trial court, and that only such objections as were stated to that court can be considered on appeal. In the bill of exceptions the objection to a part of Dr. Webster's testimony is thus stated:

"To which question the defendant objected, because he has not said that he based his opinion on what the plaintiff told him, and also as being irrelevant, incompetent, and immaterial, and not cross-examination; which objection the court overruled; to which ruling of the court the defendant at the time excepted."

These are the only grounds of objection which we can consider, and we find no merit in them. It was the right of the counsel of the appellee, in cross-examining Dr. Webster, to test his knowledge and skill as a medical expert, and also to ascertain the grounds upon which he based his opinion. This right was not abridged by the answer of the witness that he did not take into account the statements of the appellee, since to hold otherwise would enable a medical witness to shut off all investigation as to his methods of examination by a general statement that he did or did not take certain matters into consideration, and to allow this would be to destroy one of the great purposes of a cross-examination. We cannot doubt that a cross-examining counsel has a right to know how a medical investigation was conducted, and what method was pursued. He has a right to know this for the purpose of ascertaining whether the examination was a thorough one, and also for the purpose of discovering whether skill and care was used.

So far as the statement of the objection urges that the testimony was incompetent and immaterial it is not entitled to consideration on appeal, for the reason that it is not sufficiently specific. General objections of this character present no available questions. Over v. Schifling, 102 Ind. 191; Shafer v. Ferguson, 2 N. E. Rep. 302; Bottenberg v. Nixon, 97 Ind. 107; Jones v. Angell, 95 Ind. 376; Lake Erie, etc., Co. v. Parker, 94 Ind. 91; Harvey v. Huston, Id. 527; McClellan v. Bond, 92 Ind. 424; Stanley v. Sutherland, 54 Ind. 339. In cross-examining a medical expert it is proper for the cross-examing counsel to state hypothetical cases for the purpose of testing the skill and knowledge of the witness. Davis v. State, *supra*, see page 498; Rog. Exp. Test. 50. It was therefore proper for the appellee, in cross-examining Dr. Webster, to state a hypothetical case and ask his opinion upon it. Where there is competent testimony given both in the examination in chief and on cross-examination, a motion made by the party by whom the witness was called, to

strike out all of such testimony, should be overruled. Wolf v. Pugh, 101 Ind. 293; Elliot v. Russell, *supra*. It is the duty of the party to select the competent from the incompetent testimony, and he will not be allowed to impose that burden on the trial court. Cuthrell v. Cuthrell, 101 Ind. 375. This is not a mere arbitrary, technical rule, but is one founded on solid principle and essential to the fair administration of justice. It is in harmony with the well-settled rule of practice, everywhere obtaining, that the motion of a party must point out the specific testimony objected to, and indicate the character of the objections; and it is also in harmony with the familiar rule that, if a demurrer is addressed to an entire pleading, it must be overruled althongh the pleading may be bad in part.

We have no doubt that much of the testimony objected to was competent. We regard it as firmly settled that declarations indicative of present pain are admissible. No authority maintaining a different doctrine is referred to, and we know of none. Much of the testimony which appellant sought to have rejected was as to statements made to medical witnesses indicative of present pain, and this testimony was clearly competent. The doubt in our minds is as to whether any part of the testimony objected to was incompetent. Where, as here, medical experts are ordered by the court to examine the plaintiff, and this is done upon the motion of the defendant, it would seem that what was said by the plaintiff during the course of the medical examination, in answer to questions asked by the medical experts, should go in evidence. They are declarations accompanying an act, and the general rule undeniably is that where the act is admissible, so also are the declarations accompaning it. But we need not, and we do not, decide this question. Where medical experts are ordered to examine a plaintiff, and they are called and questioned by the defendant as to the result of their examination, the plaintiff has a right to ask, on cross-examination, how the examination was conducted; and this necessarily includes the right to ask what questions were propounded to the plaintiff. If it were otherwise, the plaintiff could not get fully before the jury the method of investigation pursued by the medical experts, and to deny this would be an unjustifiable restriction of the important right of cross-examination. Another reason supports our conclusion, and that is this: Where a party gives evidence of a part of a transaction, his adversary has a right to full details of the whole transaction. Evidence of an examination of a plaintiff made by a medical witness is not rendered incompetent by the fact that the adverse party was not present at the time it took place. A plaintiff who submits to an examination by a physician cannot be deprived of the testimony of the physician upon the ground that it was made at a time when the defendant was not present. If the examination of a medical expert is properly made, it is not to be kept out of the evidence because it was made after the commencement of the action. Doubtless, the circumstances under which a medical examination was made may affect, either beneficially or injuriously, the credibility of the witness, but the mere fact that it was made after the action was instituted cannot destroy its competency.

We have carefully read Dr. Burke's testimony, and we cannot find that he gave in evidence any statement made to him by the appellee as to past symptoms and pain. In one place he says that "I, having convinced myself then that there was an incipient paralysis of the muscles of the eye, and having questioned the lady whether she could see double sometimes, and she answering me that it was a great tribulation,"—but here he was interrupted by appellant's counsel, and, on resuming, he stated the result of his own observations without rehearsing any statements made by the appellee. We cannot perceive the shadow of a reason for affirming that there was here any statement of past symptoms; on the contrary, it clearly appears that the symptoms referred to were present at the time the examination was made. It is not necessary for us to decide whether statements of past symptoms are or are not admissible, although it is proper to say that there are very many well-considered cases declaring that they are admissible, for we are clearly of the opinion that the testimony was descriptive of present, and not of past, symptoms.

We have already said that it is proper to assume facts in a hypothetical question, and we now add that it is always proper to incorporate in a question to a medical expert the result of knowledge, obtained by an examination made by him. A medical expert who has obtained knowledge of the facts of the case, and has stated the facts to the jury, may take them into consideration in giving his opinion. It seems quite clear to us that knowledge obtained from actual observation is as important and weighty as knowledge communicated in an assumption made in a hypothetical question. The physician who examines and treats a case is in a situation to know as much, if not more, of the real condition of his patient, than those who have not seen the patient at all, or have seen him but once. We can conceive of no reason that would require a physician, in stating his opinion to the jury, to exclude the result of his actual observation and knowledge. In Burns v. Barenfield, 84 Ind., 43, it was said, in speaking of the testimony of a physician, that "he must base his opinion upon his own testimony, or upon a statement of the facts assumed to have been proved." One of the rules stated by Mr. Lawson is this:

"The opinion of a medical expert may be based either on his acquaintance with the party, whose condition is under investigation, or upon a medical examination of him which he he has made, or upon a hypothetical case stated to him in court." Lawson, Exp. Ev. 144.

A physician cannot be permitted to decide upon

the credibility of witnesses, nor to take into consideration facts known to him and not communicated to the jury; but, after having communicated such facts in his testimony, he may take them into consideration in forming his opinion. Koenig v. Globe Mut. Ins. Co., 10 Hun. 558; Hunt v. Lowell Gas-light Co., 8 Allen, 169; Van Zandt v. Mutual Ben. L. Ins. Co., 55 N. Y. 169; Bush v. Jackson, 24 Ala. 273) Bennett v. Fail, 26 Ala. 605. The opinion of a medical witness may rest in part on statements made by his patient. Upon this subject the authorities are in harmony, although there is some difference of opinion as to whether statements of past symptoms may be taken into consideration. Barber v. Merriam, 11 Allen, 322; Thompson v. Trevanion, Skin. 402; Aveson v. Kinnaird, 6 East, 188; Bacon v. Charlton, 7 Cush. 581; Denton v. State, 31 Tenn. 279; Illinois Cent. R. Co. v. Sutton, 42 Ill. 438; State v. Gedicke, 43 N. J. Law, 86; Eckles v. Bates, 26 Ala. 655; Quaife v. Chicago, etc. Co., 48 Wis. 513; S. C. 4 N. W. Rep. 658; Brown v. New York, etc. Co., 32 N. Y. 599; Towle v. Blake, 48 N. H. 92; Carthage Turnpike Co. v. Andrews, 1 N. E. Rep. 364; Town of Elkhart v. Ritter, 66 Ind. 136.

Counsel for appellant assert that hypothetical questions asked by the appellee required the medical expert to decide upon disputed facts, but we find, on examination of the record, that counsel are in error in assuming that the questions do call upon the witnesses to decide upon disputed matters of fact. If the assumption of counsel were correct, we should not hesitate to adopt their conclusion; but it is not a just one, for the facts are assumed to exist in each and all of the questions. The learned and able judge who tried the case, in ruling upon one of those questions, justly remarked: "If the opinion is elicited on a false state of facts, it has no weight; if the facts put to him are proven, it is otherwise." This is the law. If the facts upon which the opinion is based are not proved, the opinion is valueless; or if there is a failure to prove some of the material facts, the opinion is to that extent weakened and impaired. Goodwin v. State, *supra*, and authorities cited. Whether the facts are all proved, or to what extent proved, is a question not for the court, but for the jury; unless, indeed, the case is one in which there is no evidence at all tending to prove the existence of the facts assumed. We have no doubt that mere fanciful questions, having no evidence at all in support of the facts assumed, or questions assuming facts wholly irrelevant to the subject of the investigation should be excluded. People v. Augsbury, 97 N. Y. 501; Fairchild v. Bascoub, 35 Vt, 398; Williams v. Brown, 28 Ohio St. 547. But where there is evidence either directly proving the facts assumed, or evidence from which such facts may be inferred, the court cannot invade the province of the jury and decide upon the facts. It is only where there is no evidence at all in support of the facts assumed, or where the question is clearly irrelevant, or where it is merely speculative, or where it is improperly framed, that the court can interfere. Counsel refers us, among other cases, to the case of Hitchcock v. Stillwell, 38 Mich. 501. That case decides, as we have here and elsewhere decided, that a medical expert must not be called upon to decide disputed questions of fact. Craig v. Noblesville, etc. 98 Ind 109; Burns v. Barenfield, 84 Ind. 43. We do not doubt the correctness of this rule, but it cannot apply where, as here, the facts are assumed, and the opinion is asked upon the facts which the witness is informed are to be regarded by him as actually existing. We have already said that the medical witness must state to the jury all the facts within his own knowledge which he takes into consideration in forming his opinion. Upon this point Hitchcock v. Stillwell goes no further than we have done. But the appellant can get no comfort from this rule, for the physicians did state the facts upon which they based their opinions.

In cross-examining a medical expert, counsel have a right to assume the facts as they believe them to exist, and to ask the expert's opinion upon the facts thus assumed. An examination in chief can not be so conducted as to compel the cross-examining counsel to merely follow the line of questions there asked; but when a general subject is opened by an examination in chief, the cross-examining counsel may go fully into details and may put the case before the expert witness in various phases. Each side has a right to take the opinion of the witness upon its theory of the facts established by the evidence. While it is true that a cross-examination must be confined to the subject of the examination in chief, it is not true that the cross-examining party is confined to any particular part of the subject. He has a right, in such a case as this, to leave out of the hypothetical question facts assumed by the counsel on the direct examination, if he deems them not proved, and he also has the right to add to the question such facts as he thinks the evidence establishes. Davis v. State, *supra;* Rog. Exp. Test. 46.

A very long and much involved hypothetical question was put to Dr. Webster by the appellant, but, upon the appellee's objection, the court refused to permit it to be answered. To this question there is at least one valid objection. This objection is that it assumes, as one of the facts, the opinion of another physician that Miss Falvey, the appellee, was not suffering from a lesion of the spine. It is not proper in asking hypothetical questions to incorporate in them the opinions of other expert witnesses. An opinion of an expert witness cannot be based upon opinions expressed by other experts. Facts, and not opinions, must be assumed in the questions. If it were otherwise, opinions might be built upon opinions of experts, and the substantial facts driven out of the case. An opinion cannot rest, in whole or in part, upon other opinions, but must rest on facts. It is competent to prove by medical experts the

probability that the injury will permanectly impair the health and physical or mental ability of the plaintiff. In cases of this class there can be one action only, and, in the one action, all damages, past and prospective, must be recovered. Town of Elkhart v. Ritter, 66 Ind. 136; City of North Vernon v. Voegler, 2 N. E. Rep. 821. In order to assist the jury in arriving at a conclusion as to the character of the injury, and the probability of its permanently affecting the plaintiff, it is proper to take the opinion of medical experts upon that subject. Tinney v. New Jersey Steamboat Co., 12 Abb. Pr. (N. S.) 1; Filer v. New York Cent. R. Co., 49 N. Y. 42; Wilt v. Vickers, 8 Watts, 227; Kent v. Town of Lincoln, 32 Vt. 592; Johnson v. Cent. Vermont R. Co., 56 Vt. 707; Hoard v. Peck, 56 Barb. 202; Montgomery v. Town of Scott, 34 Wis. 338; Toledo, etc. v. Baddeley, 54 Ill. 19; Anthony v. Smith, 4 Bosw. 503.

The affidavit of Dr. O'Ferrall was exeluded on the motion of the appellee, and of this ruling the appellant complains. It is said that this affidavit was competent for the purpose of showing that the appellee objected to a medical examination of her person. We perceive no merit in this position. The appellee unquestionably had a right to make the objection she did, and the jury could have nothing to do with her conduct in opposing an examination. It is a debatable question whether a party can be compelled to submit to a medical examination at the instance of the opposite party, and it cannot affect the merits of the case that an objection is made to such an examination. If the appellant's purpose was to contradict Dr. O'Ferrall, then the proper ground for an impeachment should have been laid. As no foundation for an impeachment was laid, the affidavit was not admissible for the purpose of contradicting him. It was proper for the appellee to prove the directions given her by her physician, and that she had obeyed them. This evidence was competent to rebut the inference that her own imprudence, or her disregard of medical advice, had aggravated her injuries.

The complaint states the character of the injuries received by the plaintiff, and alleges that she was permanently injured, and under these allegations it was proper to give evidence of the mental and physical condition of the plaintiff. In Ohio, etc. Co. v. Selby, 47 Ind. 471, it was said:

"The complaint alleges that the plaintiff was grievously bruised, hurt, and injured. Under these general allegations, the plaintiff was entitled to prove any and all injuries which he received, and which were consequences of the wrongful act of the appellant."

The case quoted from is approved in Town of Elkhart v. Ritter, *supra*, and is sustained by many authorities, among them: Delie v. Chicago, etc., Co., 51 Wis. 401; s. c., 8 N. W. Rep. 265; Johnson v. McKee, 27 Mich. 472; Ehrgott v. Mayor, 96 N. Y. 264. Edmund H. Applegate was called as a witness by the appellant, and among other questions asked him was this: "State what her apparent age was." To this the witness answered, you want my opinion of her age?" and counsel, answering the inquiry of the witness, said, "Yes, sir," whereupon the witness replied: "In my opinion she was 22 or 23, or 4, or 5; from 23 to 25 in appearance." On cross-examination appellee's counsel pointed to a bystander named Stephen Wilstack, and asked Applegate: "How old do you think he is?" and the answer of Applegate was: "Well, I think he is about 55." In giving evidence in reply, the appellee called Wilstack and asked him his age, to which he replied that he was 46 years of age. We think there was no error in this ruling. It was competent for the appellee to prove that Applegate's opinion was of little or no value, because of his incapacity to correctly judge of a person's age. It is said by appellant's counsel that, in asking Applegate to give his opinion as to Wilstack's age, he was called upon to make a guess, but this is an erroneous assumption, for, in calling upon Applegate to give his opinion as to Wilstack's age, no more was done by appellee than was done by appellant in asking Applegate to give his opinion of Miss Falvey's age. The testimony was not irrelevant. The rule upon this question is thus stated by Mr. Stephens: "Facts, not otherwise relevant, are deemed to be relevant if they support or are consistent with the opinions of experts, when such opinions are deemed to be relevant." Steph. Ev. art. 50. The reason for this rule is that it is proper to test the capacity of the witness, and to ascertain the reasonableness, or establish the unreasonableness of his opinion. Folkes v. Chadd, 3 Doug. 157; Davis v. State, *supra*. The court gave the following instruction:

"It was the duty of the plaintiff to use ordinary care, judgment and diligence in securing medical or surgical aid after she received the injuries complained of, if any she received; and if you find from the evidence that after she received such injuries, if any she did receive, she failed to use such ordinary care, judgment, and diligence in procuring timely medical or surgical aid, and if you further find from the evidence that, by reason of such failure, her condition is now different, and worse than it would have been if she had used such ordinary care, judgment, and diligence in the premises, then, if you find for the plaintiff, you should take this into account in making up your verdict, and should not allow her any damages for ailments and diseases, if any, that may have resulted from such failure."

This instruction expresses the law correctly. One who is injured by the negligence of another is bound to use ordinary care and diligence in securing medical or surgical aid, but he is bound to no higher degree of care or diligence. Beach, Neg. 21. The theory of the appellant's seventh instruction seems to be that the injured person must use more than ordinary care and diligence, and this is not the law. If this is not the theory

of that instruction, then there is no substantial difference between it and the one given by the court. Another instruction given reads thus:

"And so, too, it was the duty of the plaintiff to use ordinary care to cure and restore herself; and if you find from the evidence that the plaintiff failed to use such ordinary care in the premises, but that she unnecessarily exposed herself in inclement weather, or otherwise, after receiving her injuries, if any she received, in said accident, and thereby increased and aggravated such injuries and enhanced their evil effects, you will take these facts into account in arriving at your verdict,—if you find for plaintiff,—and should not allow any damages to plaintiff for any ailments, injuries, diseases, or their aggravation, from which plaintiff has been or may be suffering by reason of such exposure, and from which she would not otherwise be suffering."

We regard this instruction as unusually clear and forcible, and we are satisfied that it correctly states the law. A plaintiff is not bound to use extraordinary care to prevent an injury from developing into evil consequences, but is bound to use ordinary care and diligence. It is true that in some cases ordinary care will require a high degree of care, for care must always be proportionate to the danger in order to be even o..... care, but there is no requirement that in any case more shall be done than a person of ordinary prudence would do under like circumstances. Beach, Neg. 22. We are not able to perceive any substantial difference between the eighteenth instruction asked by appellant's counsel and that given. They say: "The court's instruction, while embodying most of the defendant's instruction, beclouds it, and renders it misleading and nullifies its effect, by telling the jury, in substance, that it was the duty of the plaintiff to use ordinary care to cure herself." The instruction is not subject to this criticism. It is fair in all its parts, clear in its language, and consistent in its general tenor. It is, indeed, much clearer than that presented by counsel. It is the law of this State, again and again declared, that, where the court in one instruction states the rule of law correctly, it is not bound to repeat it in subsequent instructions. Union Mut. Ins. Co. v. Buchanan, 100 Ind. 63; Goodwin v. State, *supra*, and authorities cited. It is not proper for the court to instruct the jury what inferences of fact they shall draw from the evidence. Union Mut. Ins. Co. v. Buchanan, *supra*, see pages 81, 82. For this reason, if for no other, the second instruction asked by the appellant was properly refused. But there is another objection to this instruction, and that is this: It is upon a collateral and isolated fact. Courts cannot undertake to instruct in detail upon the effect of facts put in evidence, for, if it were otherwise, instructions would be of such length as to perplex and confound the most intelligent jury that ever went into the box.

The court gave these instructions:

"A common carrier of passengers is bound to carry and transport for hire persons who are sick, weak, debilitated, or predisposed to disease, as well as those who are healthy and robust; and if you find from the evidence that the plaintiff received the injuries complained of, or any of them, in the manner alleged in the complaint, and that at the time of the reception of said injuries, or any of them, the plaintiff was predisposed to malarial, scrofulous, or rheumatic tendencies, but otherwise in good health; and you further find that said injuries, or any of them, solely excited or developed said predisposition to malarial, scrofulous or rheumatic tendencies, so that thereby, without the fault of the plaintiff, her present condition, whatever you may find that to be, has directly resulted,—then I instruct you that the plaintiff is entitled to recover to the full extent of whatever you may find her present condition to be. The court further instructs the jury that the plaintiff must show, by a preponderance of the evidence, that any injuries, ailments, or diseases from which she is now suffering, if any such there be, are the result of her injuries sustained at the time of the accident in evidence. And the court further instructs the jury that unless they find the facts to be so established by a preponderance of the evidence, they cannot assume that such injuries, ailments, or diseases have resulted from said accident."

The first of these instructions was given upon the request of the appellee; the second upon the request of the appellant. Taken together, they express law quite as favorably to the appellant as it had any right to ask. The instruction asked by the appellee, standing alone, contains nothing of which the appellant can justly complain. The question presented by these instructions has been before this court, in cases similar in every essential particular, at least twice, and the general principle involved has been asserted in very many cases. Jeffersonville, etc., Co. v. Riley, 39 Ind. 580; Terre Haute, etc., Co. v. Buck, 96 Ind. 347. In the latter case the question was fully discussed, and many authorities cited, and it is not necessary to again review the cases. It may, perhaps, be proper, as the question is an important one, to direct attention to some cases not there referred to. The case of Baltimore, etc., R. Co. v. Kemp, 61 Md. 74, was that of a passenger on a railway injured by the company's negligence, and it was there held that if the injury developed into a cancer, the company was liable for the consequences resulting from it. In the course of the opinion it was said:

"That the plaintiff may have had a tendency or predisposition to cancer, can afford no proper ground of objection. She, in common with all other people of the community had a right to travel or be carried on the cars of the defendants, and she had a right to enjoy that privilege without incurring the peril of receiving a wrongful injury that might result in developing and inflaming

the dormant germs of a fatal disease. It is not for the defendants to say that, because they did not or could not in fact anticipate such a result of their negligent act, they must therefore be exonerated from liability for such consequences as ensued."

It was also said;

"The defendants must be supposed to know that it was the right of all classes and conditions of people, whether diseased or otherwise, to be carried in their cars."

In a case the same in principle as the present the Supreme Court of Wisconsin said:

"It is reasonable to expect that in a certain class of cases, if an injury happen to one of the latter class, his full recovery therefrom may be retarded or prevented by such predisposition or tendency to disease. In the present case the defendant is chargeable with knowledge that persons with a constitutional tendency to scrofula constantly travel its streets and sidewalks, and that such tendency to such disease might greatly aggravate a bodily injury. Hence it had reasonable grounds to expect that, if one of that class was injured by reason of the admitted defect in the sidewalk, the disease might develop, and greatly retard, and perhaps prevent a cure, as in this case."

The court cited, as sustaining its decision, Oliver v. Town of LaValle, 36 Wis. 592; Kellogg v. Chicago, etc., Co., 26 Wis. 223. We cannot prolong this opinion by referring to the other decided cases, nor is it necessary that we should do so, for many are collected in Terre Haute, etc., Co. v. Buck, and, although counsel have bestowed much labor upon their briefs, only one case is cited that even remotely opposes the doctrine of our cases. The single case cited by counsel is that of Pullman Car Co. v. Barker, 4 Colo. 344; s. c. 34 Amer. Rep. 89, and that case has, whenever it has been referred to by other courts, been declared to be unsound. Among other courts that have denied its authority is our own. Cincinnati, etc., Co. v. Eaton, 94 Ind. 474; Terre Haute, etc., v. Buck, *supra*, see page 352. We cannot close the discussion of this branch of the case better than by referring to a recent work where the subject is exhaustively discussed and many cases reviewed, and where it is said:

"These rules are time-honored and indisputable, and are universally applied, except where courts cut adrift from principles. In the case of personal injuries received by passengers through the negligence of a railway company they are especially applicable, and necessary to secure to the injured party his just rights." 2 Woods, Railway Law, 1232.

The court gave the following instruction:

"If you find under the evidence that the plaintiff is entitled to recover, it will be your duty to assess the amount of damages which, in your judgment, she should recover. In estimating this amount you may take into consideration expenses actually incurred, loss of time occasioned by the immediate effect of her injuries, and physical and mental suffering caused by, and arising out of, her injuries. In addition, you may consider the professional occupation, if any, of the plaintiff, and her ability to earn money, and she will be entitled to recover for any permanent reduction of her power to earn money by reason of her injuries; and the amount assessed should be such a sum as, in your judgment, will fully compensate her for the injuries, or any of them, thus sustained."

One of the objections urged to this instruction is that it does not require the jury to assess the damages from the evidence in the case. There is no force in this objection. No juror of average intelligence could fail to understand that the court directed him to be guided by the evidence. Speaking of an instruction very similar to the one under immediate mention, it was said by Worden, J., in City of Indianapolis v. Scott, 72 Ind. 196, that, "The court enumerated certain matters that formed the elements of damages. But no jury of reasonable intelligence could have been misled into the supposition that such matters could be considered unless shown by the evidence." The instruction before us properly enumerates the elements to be considered in estimating the damages. If the capacity of the plaintiff to earn money was diminished by injury, she is entitled to be compensated, and the impairment of her ability to earn money is an element to be considered in computing the amount of the recovery. Carthage Turnpike Co v. Andrews, 1 N. E. Rep. 364; Indiana Car Co. v. Parker, 100 Ind. 181, *vide* authorities, page 195; City of Indianapolis v. Gaston, 58 Ind. 224.

We cannot disturb the verdict upon the ground that the damages are excessive. It has long been the rule in this State, declared and enforced by many decisions, that, in cases of this character, a new trial will not be granted unless the damages are such as to strike every one with the enormity and injustice of them, and such as to induce the court to believe that the jury must have acted from prejudice, partiality or corruption. Hoagland v. Moore, 2 Blackf. 167; Yater v. Mullen, 23 Ind. 562; Guard v. Risk, 11 Ind. 156; Alexander v. Thomas, 25 Ind. 268; Reeves v. State, 37 Ind. 441; Ohio, etc., Co. v. Collarn, 73 Ind. 261; Lake Erie, etc., Co. v. Fix, 88 Ind. 381; Indiana Car Co. v. Parker, *supra*.

Judgment affirmed.

NOTE.—The opinions of physicians and surgeons are a kind of expert evidence to which resort is had daily. In every trial such contradictory opinions are given, and so generally in favor of the side calling the witness, that this species of evidence has fallen into some disrepute, and justly so. Nevertheless, with the weight or value of such testimony the law has, as a general thing, nothing to do, though the advocate may make much of it in his appeals to the jury. In this note will be found a collection of the rules and principles of law regulating the competency of such testimony, with a full citation of the adjudications. Thus the opinions of medical men have been held admissible in

evidence on the following questions, viz.: That a person's physical condition is good or bad, as the case may be: Quaife v. Chicago etc. R. Co., 48 Wis. 513; that a female on whom an operation has been performed was at the time pregnant: State v. Smith, 32 Me. 370; that a new-born child was a seven month's child: Young v. Makepeace, 103 Mass. 50; that a person is sick: Thompson v. Bertrand, 23 Ark. 70; McLean v. State, 16 Ala. 672; Echels v. Bates, 26 Ala. 655; Bush v. Jackson, 24 Ala. 273; that a person has a certain specified disease: Tatum v. Mohr, 21 Ark. 355; that a certain disease is of long standing: Rogers v. Crain, 30 Tex. 284. These are all admissible under the rule that the opinion of a physician as to the condition of the human system is relevant: Lawson Exp. & Opinion Ev. 107.

The opinions of physicians and surgeons are also admissible on these questions: That a certain blow was sufficient to cause death: State v. Purnell, 7 N. J. (L.) 249; Shelton v. State, 34 Tex. 664; State v. Wood, 53 N. H. 484; that a certain wound endangers the life of the person who received it: Rumsey v. People, 19 N. Y. 42; that certain injuries on the head of a person could not have been inflicted at one time and by one blow: Com. v. Piper, 120 Mass. 169; that a certain cause was the reason for a person's death: Mobile Life Ins. Co. v. Walker, 58 Ala. 295; State v, Smith, 32 Me. 379; that a certain illness was caused by violence and not by disease: Matteson v. New York Cent. R. Co., 62 Barb. 364; that certain wounds were inflicted by a certain kind of instrument: State v. Murphy, 33 Iowa, 273; *Contra*, Wilson v. People, 4 Park. 619; that the deceased must have been in a certain position when he received the injury: Com. v. Lennox, 3 Brewst. 249; that a certain fracture of the bone was not recent: Lindsay v. People, 63 N. Y. 143; that a gunshot wound caused death: State v. Jones, 68 N. C. 443; that a burn on the body of a child was inflicted after death: State v. Harris, 63 N. C. 1; that a certain wound is mortal: Batten v. State, 80 Ind. 394; Henry v. State, 11 Humph. 224; that a blow with a club would produce certain results: People v. Rogers, 13 Abb. Pr. (N. S.) 370; that a fracture would affect the future health of the sufferer: Montgomery v. Town of Scott, 34 Wis. 338; that a person found on a railroad track was dead before the train struck him: State v. Clark, 15 S. C. 403; that the death of a certain person was caused by drowning, Erickson v. Smith, 2 Abb. App. Dec. 64; that a person's death was caused by his accidentally falling into a sink where his body was found. Davis v. State, 38 Md. 37. All these opinions it is seen are as to the cause of death and the cause and effect of an injury. In the last case cited the court say: "The question is objected to in the first place on the ground that the subject matter of inquiry is not of such a character as to warrant the introduction of expert testimony. It may be difficult sometimes to determine whether the matter of inquiry is such as to permit the opinions of experts to be offered in evidence. Witnesses ordinarily are permitted to testify only in regard to facts, and upon the facts thus proven, the tribunal before whom the case is tried is presumed capable of forming a correct judgment. In the trial of cases, however, it often happens that questions arise touching the matter of inquiry quite out of the observation and experience of persons in general, but within the observation of others, who from previous study, or pursuits or experience in life, have frequently and habitually brought that class of questions under their observation. And hence it is, that in such cases persons who, from study and experience, have acquired a peculiar knowledge in regard thereto, are permitted to testify, not only to facts, but also to give their opinions based upon facts within their own knowledge, or upon facts proved by other witnesses. * * * Whenever the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, or, in other words, when it so far partakes of the nature of a science or trade as to require a previous habit or experience or study, in order to the attainment of a knowledge of it, the opinion of experts is admissible. * * * Here the body of the deceased was found in the sink or bin of his mill, with six wounds on the head, one of which involved the fracture of the skull, and in the absence of direct proof, the question as to how, and by what means they were inflicted, depended to some extent, at least, upon the character and appearance of the wounds themselves. The inquiry then involved not only the general appearance of the wounds and the extent of the injury, whether they were inflicted by a sharp, or by a dull instrument, or by accidentally falling into the sink, but also some knowledge at least of the anatomy of the skull,—the relative strength and weakness of the several parts thereof—questions which could only be satisfactorily determined by the skill and experience of persons accustomed to and familiar with the examination of wounds."

Likewise the opinions of medical men are admissible in these matters, viz.: The effect of a certain medicine, or of a particular treatment on a particular person: Hoard v. Peck, 56 Barb. 202; Wright v. Hardy, 22 Wis. 348; State v. Slagle, 83 N. C. 630; the likelihood of a person's recovery from a disease or injury: Wilt v. Vickers, 8 Watts, 227; Filer v. New York Cent. R. Co., 49 N. Y. 42, and as to the mental condition of a person—that he is insane or sane: Davis v. State, 35 Ind. 496 and cases cited in Lawson Ex. & Op. Ev. p. 144.

And the opinions of physicians are admissible on the question as to the value of medical services rendered. Board of Commr's. v. Robinson, 64 N. Y. 595.

To give an opinion as a medical expert, the law does not require that the witness should belong to any particular school of medicine. "The law has nothing to do with the merits of particular systems:" Corsi v. Maretzek, 4 E. D. Smith, 1. If the witness is a medical man, and has the requisite knowledge he may have acquired this knowledge either by study alone: State v. Wood, 53 N. H. 484; or by practice alone: Mason v. Fuller, 45 Vt. 29; he need not have made the subject a specialty in his practice: Castner v. Sliker, 33 N. J. L. 97, where a physician not an oculist was allowed to give his opinion as to how certain injuries to a person's eyes had been received. Pierson v. Hung, 47 Barb. 243, where the opinion of a physician not a veterinary surgeon as to the disease of a horse was received. In Baxter v. Abbott, 7 Gray, 71, the question was whether a certain person was insane, and the opinion of the family physician was held admissible though he had never given special study or attention to diseases of the brain. "The settled practice" said the court, "has been to admit the opinions of educated practicing physicians upon subjects of medical science. Until quite a recent period the disease of insanity had not been made a specialty. That it is now made a special study by a small number of physicians may be a good reason for giving to their opinion greater weight; but it is not a sufficient reason for excluding the opinions of other physicians. It is well known that various classes of diseases, as those of the spine, the eye, the ear, the skin, have become specialties, especially in our larger cities, where such division of labor becomes practicable. But this fact does not render incompetent upon these subjects the testimony of other physicians who must necessarily have less experience. The difference is in the weight rather than the competency of the testimony. * * * To adopt the limitation made by the rule of the presiding judge

would be to confine opinions on questions of insanity to those physicians who have made insanity a special study and pursuit. As most cases of insanity are treated in hospitals and public institutions, the limitation would practically confine parties to physicians who were or had been engaged in those institutions. The number of these is so small and their attendance so difficult to be procured, that the limitation would be in effect an exclusion of matters of opinion upon subjects where it is difficult even for the best trained minds to distinguish and adhere to the line which separates opinion from fact. For with respect to the powers and faculties of the mind it is obvious we can directly know nothing. We know them only, as they are manifested in action. Nor if the opinions of persons who have made the subject of mental disease a special study could be had, would it be wise to limit matters of opinion exclusively to them? Large as is the debt which science and humanity owe to them, great as are the advantages which spring from the devotion of the mind to special study, a not unfrequent result is—what it used to be said was the mark of a good judge—a tendency to enlargement of jurisdiction. As it is it cannot be wholly avoided. To put upon the stand a skilful physician (and such an one has never understood the bodies of his patients, unless he has known also something of their minds and the action of one upon the other), to get from him the history of his patient, the state of his bodily health, his conversation, conduct, traits of character in sickness and in health; and then to exclude the opinion which as the result of all his mind has almost insensibly and necessarily formed; and yet upon this imperfect history of his patient to ask a perfect stranger to that patient to give his opinion of his mental condition, because he has made mental disease a special study, would be to reject the most valuable evidence for that which, in the nature of things, must be of far less worth."

Nor to give an opinion as a medical expert, need the physician (except in Wisconsin where it is required by statute) be a graduate of a medical college or duly licensed. New Orleans, etc. R.Co. v. Allbertson, 38 Miss. 247. Nor need he be at the time in practice: Roberts v. Johnson, 58 N. Y. 613: Tulles v. Kidd, 12 Ala. 648; Everett v. State, 62 Ga. 65. Nor need he have met a similar case in the course of his reading or practice. State v. Clark, 12 Ired. (L), 151. And finally it is not even essential that he should be a physician or should have studied for one—provided he has acquired the special knowledge required of a medical expert, *Re* Toomes, 54 Cal. 515; Dole v. Johnson, 50 N. H. 452.

The opinion of a physician may be based on his actual observation without regard to his position as a witness or upon an examination made by him in or out of court for the purpose of the case. Bitner v. Bitner, 65 Pa. St. 347, or upon a hypothetical case stated to him by counsel on the trial. Spear v. Richardson, 37 N. H. 28; Getchell v. Hill, 21 Minn. 464; Perkins v. Railroad, 44 N. H. 223; Hathaway v. National Life Ins. Co. 48 Vt. 335; State v. Hayden, 51 Vt. 296; Hunt v. Lowell Gas Co., 8 Allen, 169; Nash v. Hunt, 116 Mass. 237; Koening v. Globe Mut. Ins. Co., 10 Hun., 558; Negroes v. Townshead, 9 Md. 445. But the witness must not be called on to pass upon disputed facts. Fairchild v. Bascomb, 35 Vt. 399. In Lawson on Expert and Opinion Evidence, p. 152, it is said: "An expert cannot give an opinion on a hypothetical statement which is not supported by the facts as brought out at the trial. Hurst v. Chicago, etc., R. Co., 49 Iowa, 76. There must be evidence tending to prove the matters stated in a hypothetical case to render it proper. Bongardner v. Andrews, 55 Iowa, 638; Butler v. St. Louis Ins. Co., 45 Iowa, 93. But some latitude must necessarily be given in the examination of medical experts, and in the propounding of hypothetical questions for their opinions, the better to enable the jury to pass upon the questions submitted to them. The opinion is the opinion of the expert, and if the facts are found by the jury, as the counsel by his questions assumed them to be, the opinion may have some weight, otherwise not. It is the privilege of the counsel in such cases to assume, within the limits of the evidence, any state of facts which he claims the evidence justifies, and have the opinion of experts upon the facts thus assumed. The facts are assumed for the purpose of the question, and for no other purpose. Filler v. New York, etc., R. Co., 49 N. Y. 42. If the facts stated in hypothetical cases are not proved, the opinion, of course, goes for nothing. Hovey v. Chase, 5 Me. 304. As a rule the court should refuse to allow the expert to give his opinion on facts proved by witnesses unless he has heard all the testimony because the entire testimony may be necessary to enable him to form an opinion in regard to the subject-matter of inquiry: Webb v. State, 9 Tex. (App.), 490; Hunt v. State, 9 Tex. (App.), 116. But of course, there may be cases where this is not essential: Davis v. State, 38 Md. 41."

But the opinion of a medical man as an expert is not admissible on questions which do not call, in their solution, for any special skill or learning of the profession —as for example as to the value of property: Hook v. Stovall, 26 Ga. 704; or the measure of damages on the breach of a contract: Linn v. Sissbee, 67 Ill. 75, or the position of combatants in a fight: Dillard v. State, 58 Miss. 368. Nor is it admissible on questions of law, as that a prisoner is not legally responsible for her acts: R. v. Richards, 1 F. & F., 87; State v. Klinger, 46 Mo., 224; or possessed sufficient mental capacity to make a will: Fairchild v. Bascom, 35 Vt. 398; *Re* Arnold, 14 Hun. 525. Nor is it admissible as to conclusions which are for the jury to draw: Laws. Exp. Ev. 138.

Finally it must be observed that the jury are not bound to follow the opinions of medical experts or where they are divided the opinions of the majority: Watson v. Anderson, 13 Ala. 202; Tatum v. Mohr, 21 Ark. 355; Chandler v. Barrett, 21 La. Ann. 58; Getchell v. Hill, 21 Minn. 464. In this last case the court while laying it down that the jury may act against the greater number of opinions and in favor of the fewer, set aside the verdict because satisfied that the jury did not weigh the testimony of the experts but acted entirely independent of it. ***

WEEKLY DIGEST OF RECENT CASES

1. CONSTITUTIONAL LAW. [*Prohibition.*] *A variance Between Title ana Body of bill to Affect its Constitutionally, Must Relate to Entire Bill.*—A material change in the subject as expressed in the title, between the bill which passed the houses of the General Assembly, and the enrolled bill which was approved and signed by the Governor, is fatal to the entire law; but this effect will not be

allowed to an omission, from the title of the enrolled and approved bill, of words which were included in the title, as it passed the two houses, when the omitted words do not change the substance and effect of the law, or when the other portions of it can have full operation without reference to the omitted words. [In rendering the opinion of the court upon this point, Clopton, J., said: "Where the Governor approves a bill, and the bill as approved materially varies in substance and legal effect from the bill as passed by the General Assembly, then there exists such a want of legal and actual identity between the bill passed and the one approved, that neither of them acquires the force of a valid and constitutional enactment." Jones v, Hutchinson, 43 Ala. 471; Moog v. Randolph, 77 Ala. 597. And since the title is not only important but absolutely controls, it may be regarded as a sound rule, that any change in the title, as enrolled for the approval of the Governor, which affects the entire bill, will produce the same consequence. An unimportant and immaterial variance will not defeat the validity of the act as a law. In Jones v. Hutchinson, *supra*, it is said: 'If in such case, the matter erroneously inserted did not affect the original bill, as it had been engrossed and passed, or did not change the substance or vary the legal effect thereof. We would not be understood as deciding that the error would vitiate the entire act; in this case, a proviso, which had been rejected by both houses, and which qualified and restricted the general provisions of the bill, had been copied into the enrolled bill. In Moog v. Randolph, *supra*, the revenue bill was under consideration, and an important amendment was omitted from the enrolled bill. The court, conceding that if the amendment was unconstitutional, the bill as approved would be identical in legal effect with that passed by the General Assembly, bnt holding the amendment constitutional, therefore the omission vitiated the entire act. A revenue bill, ordinarily, is one and entire system, all the provisions of which sustain a mutual dependence and mutual relation; the omission of a material part disturbs the equilization of the system, and varies, more or less, the substance and legal effect of the entire bill. On what principles shall it be determined whether the change in the bill, as approved, materially varies in substance and legal effect the bill as passed by the General Assembly? A safe and practical rule is the one on which the courts adjudge a statute unconstitutional *in toto* or in part. Cooley Cons. Lim. (5th ed.), 211, 212."] *Stein u. Leeper*, S. C. of Ala. Dec. Term, 1885-86.

2. CONSTITUTIONAL LAW.—*United States Constitution—Prosecution by Information,— Criminal Law—When Prosecution cannot be by Information—Statutes—Construction.*—The provisions of the Federal Constitution do not apply to criminal prosecutions under State laws, except in cases where the States are named. The fourteenth amendment to the Federal Constitution does apply to the States; but, where the Constitution of the State provides for the prosecution of felonies by information, a prosecution by information is not in violation of the provisions of that amendment. An information cannot be rightfully filed against a defendant at a term of court to which he was recognized to appear, after the grand jury had been discharged without finding an indictment against him. Statutes are to be construed as parts of one great and uniform system of law. *State v. Boswell*, S. C. Indiana, January 29, 1886; N. E. Reporter.

3. GUARDIAN AND WARD—*Sale of Ward's Land—Purchase by Guardian—Confirmation—Ratification—Fraud—Re-Sale—Guardian's Bond*—A sale of the ward's land purchased by the guardian, which is confirmed by the orphans' court and ratified by the ward upon attaining majority, has all the legal incidents against the guardian of a sale valid when made. Where a guardian purchased his ward's land, and the sale was confirmed by the court and the ward, and subsequently, by the guardian's fraudulent representations the sale was set aside and a resale had, the second sale was void on account of the fraud, and the first sale valid, and the ward had the right, on waiving the trust and holding the guardian as a mere debtor, in the absence of fraudulent combination with him, to compel payment of the debt from the sureties of the defaulting guardian. *Schur's Appeal*, S. C. Pennsylvania, January 18, 1886.—Atl. Rep.

4. *Judgment—Satisfaction of—Law of the Case.*—The decision of the Supreme Court, on an appeal in a case determining the proportion of the judgment to which, as between himself and his co-plaintiff, the appellant is entitled, becomes the law of the case to the extent thus determined, and upon a tender thereof by the defendant, he becomes entitled to a satisfaction of the judgment. *Haggin v. Clark*, S. C. California, January 30, 1886; Pac. Reporter.

5. LIFE INSURANCE. *Contract—When the Failure of one Party an excuse for Non-Performance on Part of the Other-Tontine Plan.*-Plaintiff brought action on a policy of insurance issued by defendant, on the tontine plan, on the life of her husband, but failed to allege that she had paid the premiums. On a demurrer being interposed, plaintiff claimed that an allegation of the failure of defendant to keep the funds separately invested as agreed upon by it, and the non-performance of other obligations assumed by it, justified non-performance by her, and established a cause of action in her favor. *Held*, that the complaint was demurrable; that the failure of one party to a contract to perform some of its obligations, when it consists of a number of independent provisions, furnishes no excuse for non-performance by the other party. It is only where the non-performance is of a condition precedent, or where such party has wholly refused to perform, or has wholly disabled himself from completing a substantial performance, or a tender thereof. The tontine plan does not require an insurance company to keep the funds in each class separately invested, and it is no breach of its contract with assured, that it neglected to do so; and, even if an obligation to do so could be implied from the provisions of the policy, it furnishes no excuse for the non-performance by the plaintiff of her contract, in omitting to pay the premiums. *Bogardus v. New York Life Ins. Co.*, Court of Appeals, N. Y., January 19, 1886; N. E. Rep.

6. LIS PENDENS—*Continuous Prosecution Necessary.*—A continuous prosecution of the suit is necessary to enable the claimants therein to charge with notice by the doctrine of *lis pendens* a purchaser for value without notice in fact. In the present case the *lis pendens* had been carried to the Supreme Court by the unsuccessful party, and

a judgment was there entered reversing and remanding the cause. The complaint did not file in the trial court the mandate of the Supreme Court until over four years after it was rendered; and during all that time the suit had no place as a pending case on the docket of either court. A purchaser for value, taking during such period without any actual notice of the complainant's claim, will not be charged with notice by the doctrine of *lis pendens*. *Duraud v. Lord*, S. C. Ill., January 25, 1886; N. E. Rep.

7. MALICIOUS PROSECUTION.[*Action.*] *What is Necessary to Sustain Action for Malicious Prosecution.*—To sustain an action for a malicious prosecution, the prosecution must have been instituted, not only maliciously, but also without probable cause. [In giving the opinion of the court upon this point, Somerville, J., said: "The present action, which is for malicious prosecution, will not lie, as the court correctly instructed the jury, unless it was instituted, not only maliciously, but also without probable cause: 'Neither of these elements alone will do, but both must concur to make the defendant liable.' McLeod v. McLeod, 73 Ala. 42; 2 Greenl. Ev., § 453. The fact that a person entertains malice towards another does not debar him of his legal right to put in motion a justifiable prosecution against the latter. While malice, which in its legal acceptation, implies any improper or wrongful motive rather than actual malevolence, may be inferred from the want of probable cause, the converse of this is not true, for it is settled law that 'from the most express malice the want of probable cause cannot be implied.' 2 Addison Torts, § 853; Cooley on Torts, 185." *Steed v. Knowles*. S. C. of Ala., December Term, 1885-86.

8. —— ——. [*Probable Cause.*] *Definition of Probable Cause.*—"In McLeod v. McLeod, 73 Ala. 42, we gave many approved definitions of probable cause, to which we need add nothing. It is clear, from the weight of authority, that, it involves not only an honest belief on the part of the prosecutor that the plaintiff was guilty of the offense charged, but it must also have been a belief based upon reasonable grounds, as opposed to one founded, as was said in Long v. Rodgers, 19 Ala. 321, upon the caprice, prejudice, or the idle dreams of the prosecutor." Trouman v. Smith, 12 Amer. Dec. 265, note; Bacon v. Tonne, 4 Cush. 238. There can be no justification without honest belief compled with and supported by reasonable grounds. Shawl v. Brown (28 Iowa 37), s. c. 4 Amer. Rep. 151; 1 Hilliard on Torts, 474; McLeod v. McLeod, 74 Ala 484."—*Ibid.*

9. —— ——. [*Advice of Counsel.*] *Advice of Counsel is a Complete Defense to an Action for Malicious Prosecution.*—That the prosecution was instituted by the advice of counsel, given upon a fair and full statement by the prosecutor of all the facts known to him, or which, by proper diligence, he could have ascertained, is a full defense to the action; though the advice was erroneous, or was not warranted by the facts stated. "While it is true, as sometimes stated, that no man can shelter his malice by showing that he has bought an unfounded prosecution under the advice of a weak or ignorant man, yet it is now everywhere conceded, that, where the prosecutor has fully and fairly submitted to learned counsel all the facts which he knows, or by proper diligence could know to be capable of proof, and is advised that they are sufficient to sustain the prosecution, and acting in good faith upon such opinion he does institute such proceding, he cannot be held liable in an action for malicious prosecution, although the legal opinion given him be erroneous. According to some of the authorities this evidence is competent to rebut malice, and, according to others, to establish the fact of probable cause. In Blunt v. Little, 3 Mason's Rep. 102, Mr. Justice Story expressed the opinion that such evidence was admissible both "for the purpose of rebutting the imputation of malice and establishing probable cause." But, which ever view be correct, it is generally agreed that it furnishes a complete defense to the whole action, and is not limited to a mitigation of damages. McLeod v. McLeod, 73 Ala. 46; 2 Greenl. Ev. § 459; Cooley on Torts, 183-184; Brobst v. Ruff (100 Penn. St. 91.) s. c. 45 Amer. Rep. 356; Chandler v. McPherson, 11 Ala. 916; Stone v. Swift, 4 Mass. 389; Froman v. Smith, 12 Amer. Dec. note, p. 266 and cases cited; Griffin v. Chubb, 57 Amer. Dec. 85 (s. c. 7 Tex. 603); White v. Carr, 36 Amer. Rep. 353 (s. c. 71 Me. 585). It is not necessary that the facts should have clearly warranted such legal advice. If this were so, then the professional advice would be entirely useless for any purpose, because the defense would be complete without it. A qualification of the rule in this way, as said by Underwood, J., in Walter v. Sample, 25 Penn. St., 275, "destroys the rule itself." The learned judge further observed, "Professors of the law are the proper advisers of men in doubtful circumstances, and their advice, when fairly obtained, exempts the party who acts upon it from the imputation of proceeding maliciously and without probable cause. It may be erroneous, but the client is not responsible for the error. He is not an insurer of his lawyer. Whether the facts amount to probable cause is the very question submitted to counsel in such cases; and when the client is instructed that they do, he has taken all the precautions demanded of a good citizen." The rule has been held not to apply to counsel who was interested in the subject matter of the suit. (White v. Carr, 36 Amer. Dec. 353; or to embrace a mere justice of the peace, who was not a licensed attorney (Brobst v. Ruff, 45 Amer. Rep. 358). But it applies with much force where a prosecutor acts under the advice of an authorized officer of the law, whose duty it is to conduct criminal prosecutions. Thompson v. Lunley, 50 How. Prac. 105. *Ibid.*

10. MASTER AND SERVANT—*Action for Injury—Evidence—General Repute—Permanency of Injury—Covered Railway Bridge—Company's Duty to Employees—Employee's Duty to Know of Defects and Obstructions to the Road—Trial—Remarks of Counsel—Impropriety in, not Sufficient Ground for Reversal.*—In an action for injuries to the person, it is inadmissible for the defendant to rebut the plaintiff's evidence that the injury was permanent by showing a negative general repute; *e. g.*. that there was no general repute in the village that such injury was permanent. An instruction that if a railroad company constructs a covered bridge along the line of its railroad, it should build it of sufficient height so that persons employed by the railroad company as brakemen, and who are required to go upon the top of freight trains in discharging their duty as brakemen, while going through the bridge, may pass through without danger to their personal safety, *held*, in connection with other instructions, fully stating the plaintiff's (brakeman's) duty to observe due care, to be a

proper statement of the law as to the company's duty. An instruction that the law does not require of a brakeman that he should absolutely know all of the defects of construction and all the obstructions there may be along the line of the railroad, nor that he should neglect the performance of his duties as a brakeman to be on the constant lookout for such obstructions and defects which may be dangerous, *held* not to be erroneous. In an action against a railway company for injuries to the person by an accident alleged to have been caused by the negligence and default of the company; the counsel for the plaintiff said, in his closing argument: "For more than twenty years I have stood as a humble advocate of the people against the power of such monopolies as this." *Held* improper, but not alone ground for reversal. *Chicago etc. R. R. Co. v. Johnson*, S. C. Ill., Jan. 22, 1886; N. E. Rep.

11. MASTER AND SERVANT — *Duty — Designation— Volunteers—Risk— Acquaintance— Negligence.*— The scope of an employe's duties is to be defined by what he was employed to perform, and by what, with the knowledge and approval of his employer, he actually did perform, rather than by the mere verbal designation of his position; and where there was evidence to the fact that the employes were in the habit of performing the work at which the plaintiff was injured, the jury would have been warranted in finding him not a mere volunteer. While a servant will be deemed to have assumed all risks naturally and reasonably incident to his employment, and to be acquainted with all risks which, to a person of his experience and understanding, are or ought to be, open and obvious, yet where there is any doubt whether the servant was so acquainted, or ought so to have been, the determination of the question is necessarily for the jury. An employee engaged by the "roller boss" in a "spike-mill," doing the work of the owners of the mill upon their machinery, the mill itself being operated by them, may be treated as their employe, and not as a trespasser. *Rummell v. Dilworth.* S. C. Pennsylvania, Jan. 4, 1886; Atl. Rep.

12. NEGLIGENCE—*Setting Fire to Dwelling—Fire Spreading From Another Building—Proximate Cause.*—Where fire is negligently thrown from a mill smoke-stack, and carried to a building outside the mill property, and thence to another building of a third party, and thence to other property that is damaged by the fire, whether such negligence is the proximate cause of such damage, is a question of fact for the determination of the jury under the instructions of the court. In an action against a mill-owner for damages to property caused by fire negligently or carelessly thrown by sparks from the smoke-stack of the mill, and carried to the property by a gale of wind blowing at the time in the direction of the property, by which fire the same was damaged, where the conditions continue the same as when the negligent and careless act was done, and no new cause intervenes, it is no defense that the fire first burned an intervening building, and was thence communicated by sparks and cinders in the same manner to the building in which such fire consumed the property, though the buildings were separated by a space of 200 feet. *Adams v. Young*, S. C. Ohio, February 23, 1886; N. E. Rep.

13. PARTITION. [*Possession.*]—*Action for Maintainable only by Party in Possession.*—At common law, as well as under the statute of Wisconsin, an action for partition can only be maintained by one having the actual or constructive possession of the premises, or the right to the same. [In giving the opinion of the court so holding, Cassoday, J., says: "The statute provides what the complaint must contain. Section 3102. It must in detail "set forth the rights and titles of all persons interested therein, so far as the same are known to the plaintiff." Id. "But in case any such person, or his share or interest, be unknown to the plaintiff, or be uncertain or contingent, * * * * so that such person or his interest could not be named or set forth, the same shall be stated in the complaint; but no person whose title or interest appears of record, or who is in the actual possession or occupancy of any such lands, shall be considered or proceeded against as an unknown owner." Id. That section of the statute and others clearly imply that all persons having any right, title, or interest in the premises, which would be involved or necessarily affected by a complete partition, or an absolute sale of the whole premises, must, if they are known, be made parties to the action. §§ 3106-3109, 3116, 3118, 3119, 3121, 3125, 3127, 3133, 3141, 3143. The same was the rule at common law. Burhans v. Burhans, 2 Barb. Ch. 398; Kester v. Stark, 19 Ill. 328; Brashear v. Macey, 3 J. J. Marsh. 93; Batterton v. Chiles, 12 B. Mon. 354; Lancaster v. Seay, 6 Rich. Eq. 111; Harlan v. Stout, 22 Ind. 488. The statute also provides that "any defendant may deny the joint tenancy or tenancy in common of any co-defendant, and any issue of fact between the parties may be tried by a jury, as in other cases.' § 3105. The issue of fact to be thus tried by a jury has been held to relate only to questions between co-defendants, and not to controverted questions of legal title between the plaintiff and a defendant where ejectment may be maintained. Deery v. McClintock, *supra*. Where, in an action for partition, a controversy arises between the plaintiff and one or more of the defendants, as to the legal title to the premises, the practice indicated by this court has been to the effect that either the proceedings in the case should be suspended until the plaintiff should establish his legal title at law, or the bill should be dismissed without prejudice to his right to file a new one after his legal title should be so established. Deery v. McClintock, *supra*; Hardy v. Mills, 35 Wis. 144; Tobin v. Tobin, 45 Wis. 298. This was substantially the rule followed in Giffard v. Williams, 5 Ch. App. 546. This should be so, especially where the plaintiff in such partition suit was not in the actual or constructive possession of the premises when such suit was commenced, and the person controverting his title was then in such actual possession. Rozier v. Johnson, 35 Mo. 326; Forder v. Davis, 38 Mo. 107. In fact, the statute seems to contemplate that such suit can only be maintained by one having the actual or constructive possession of the premises, or the right to the same. It provides thav "such action may be maintained by any person who has any estate in possession of the lands of which partition is sought, but not by any one who has only an estate therein in remainder or reversion." § 3101. Apparently, upon this theory, it was held by this court that "it is a good answer to an action for partition that the defendant has an estate for life or widowhood in the land sought to be divided. Hannan v. Oxley, 23 Wis. 519. The general rule at common law seems to be that no person has the right to enforce partition unless he has an estate in possession in the premises by virtue of which he is entitled to the present

rents or use of the property as one of the co-tenants. Freem. Co-tenancy, §§ 446, 447; Burhans v. Burhans, *supra*; Brownell v. Brownell, 19 Wend. 367; Whitten v. Whitten, 36 N. H. 326; Hunnewell v. Taylor, 6 Cush. 472; Stryker v. Lynch, 11 N. Y. Leg. Obs. 116; Albergottie v. Chaplin, 10 Rich. Eq. 428; Law v. Patterson, 1 Watts & S. 184; Longwell v. Bentley, 3 Grant Cas. 177; O'Dougherty v. Aldrich, 5 Denio, 385; Nichols v. Nichols, 28 Vt. 228.] *Morse v. Stockman*, S. C. Wis., Dec. 23, 1885; 26 N. W. Repr. 176.

14. PARTNERSHIP—*Dissolution—Change of Name—When Notice of Retirement of Partner—Notice of Withdrawal of Non-Resident Partner—Appeal—Evidence—Entries on Account Book.*—A change of a partnership name, which in itself indicates who the individdal partners are, may be sufficient evidence of a dissolution of such partnership; but where the name under which the business is transacted gives no indications of the names of the persons composing the firm, a change in such name is not notice of the retirement of a person who was previously known to have been a partner in the business. The mere allowance of an answer to a leading question, or a refusal to strike out an answer because given in response to a leading question, will not be sufficient ground for a reversal of a judgment, unless in a case which shows a clear abuse of the discretion of the court in allowing answers to such questions. The fact that a party has charged one man with an account upon his books of account, is not conclusive against him in an action to recover for the same claim against another party not named in the account so charged. A non-resident partner who has been known as a partner, must notify his former customers of his withdrawal from the firm, or he will be considered a partner as to such customers doing business at the same place, with the same person who represented the firm when they dealt therewith, until knowledge is brought home to them of his withdrawal in some way, and the reputation in the place of business, of his continuing a member of the firm is evidence tending to charge him. *Cogswell v. Davis*, S. C. Wisconsin, Feb. 2, 1886, N. W. Rep.

15. PARTNERSHIP—*Right of a Party to Participate in Profits of a Business without being Regarded as a Partner.*—Persons cannot be made to assume the relation of partners, as between themselves, when their purpose is that no partnership shall exist. There is no reason why they may not enter into an agreement whereby one of them shall participate in the profits arising from the management of particular property, without his becoming a partner with the others, or without his acquiring an interest in the property itself so as to effect a change of title. *London Assn. Co. v. Drennan*, S. C. U. S., Jan. 18, 1886; S. C. Rep.

16. RECOGNIZANCE. [*Indictment — Discharge of Bail*]. *Bail Discharged because of Non-Presentation of Indictment.*—When a person is recognized to appear at the next term of the court, to answer for an offense with which he is charged, and no indictment is found against him at that term, the prosecution is discontinued, and his bail are discharged, unless a forfeiture is then taken against them, or some entry is made continuing the cause. [In giving the opinion of the court so holding, the following language is used by Somerville, J.: "The practice on this subject was settled in the case of Goodman v. The Governor, 1 Stew. & Port. (Ala.) 464, which was decided as early as the year 1832, and has never been since overruled. It was there held, that when a party was recognized to appear at a particular term of the circuit court, to answer for an offense with which he was charged, and the grand jury failed to find an indictment against him, and the cause was not continued for further investigation, this operated as a discontinuance and discharged the accused, in the absence, at least, of any forfeiture being taken for sufficient reasons at such term of the court. There are cases in other States which hold that the accused is not discharged until the court enters of record an order of exoneration to this effect. But we see no harm to ensue from adhering to the rule settled in Goodman's Case, *supra*. If the accused is not called at the term of the court, at which he was to appear by the express stipulation of his bond, and no indictment is found against him by reason of the grand jury's ignoring the bill, and the circuit court makes no order authorizing a continuance of the investigation at the ensuing term, the sureties have a right to believe that they are discharged from the obligation of their undertaking. If one term of the court can be passed without action by the grand jury, or the court, why not another? And if more than one, when are the sureties to know that the legal custody of the accused, with the power to arrest and deliver him into the hands of the sheriff, has ceased or been abrogated. The safer practice perhaps, to prevent misunderstanding, is for the court to have the accused discharged by proclamation, and by entering of record an *exoneretur*, though this course is not deemed necessary, nor is it believed to be customary in this State. But where it is desired to authorize a continuance of the investigation by the grand jurors, the court, in order to hold the sureties, should make an order to this effect, showing a refusal to discharge the principal. 1 Bish. Cr. Proc. (3rd Ed.) § 870a, §264f; Rex. v. Palmer, 6 Car. & P. 652; Knott v. Sargent, 125 Mass. 95.] *Rogers v. State*, *S. C. Alabama*, Dec. Term, 1885.

17. WILL — *Construction— "Heirs" — Technical Meaning—Rule in Shelley's Case.*—A clause in a will was as follows: "I also bequeath the balance of my estate, real and personal, to my three nieces, [naming them,] share and share alike, during their lives, and at their deaths to go to their heirs, in equal amounts, to all heirs living at the time of their deaths. I also decree that no part of my real estate shall be sold during the lives of my nieces, but at their deaths can be sold in order to make distribution to heirs." The residuary legatees took, under the provisions of the will, a fee-simple in the real estate devised to them, and one-third each of the personal estate absolutely; the word "heirs" being construed to have been used by the testatrix in its technical sense. *Cockins' Appeal*, S. C. Pennsylvania; Atl. Rep.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

38. A., B., C., D., & E. employ a lawyer, G., to render certain professional services. After the work is done, G., the lawyer, asks A., B., C. & D. for thei

joint and several note in payment. This they refused to give. But he urges and tells them that he will procure E's signature, and in no event shall they, A., B., C. & D., be liable for more than a fifth (1-5) each, of the whole amount. They pay the one-fifth each. E. never signs. In a suit by G., the lawyer, v. A., B., C. & D., for the other fifth, can they show the collateral agreement by oral evidence? I can find no cases exactly in point, the nearest being Miller v. Gambie, 4 Barb. 146; Ely v. Kilborn, 5 Denio, 514; Ande v. Dixon, 6 Exch. 869. Please cite cases, or authorities.

Athens, Ga. N. B. JONES.

39. A., a married man, in 1878 conveys property without his wife's signature. In 1881 A. is divorced from his wife. By the decree both parties are restored to all their property rights obtained during marriage. Can A.'s wife, after the divorce, set up and claim dower in the property sold by the husband during marriage without her joining. Quote authorities.

X. Y. Z.

QUERIES ANSWERED.

Query 19. [No. 19, Vol. 22, Cent. L. J., p. 190.] MECHANIC'S LIENS.—A. owns a certain piece of land containing 75 acres. He executes to B. certain promissory notes, and gives B. a mortgage on said land. Said mortgage was given on the 15th day of June, 1885; and recorded June 25th, 1885. On June 20, 1885, C., at A.'s request, makes an oral contract to furnish him lumber and material for the construction of a dwelling house upon said land, and on same day delivers a certain portion of said material under said contract, continuing to deliver balance as required. Subsequently B. executes a release to A., releasing his mortgage as to ten acres, which is set out by metes and bounds, and which is a portion of the 75 acres. C. subsequently files a mechanic's lien, in accordance with the laws of Nebraska, where the property is situated. What are the rights of C. as against the mortgagee, taking into consideration date of the recording of the mortgage, also the release?

Answer.—At most the lien of the mechanic would have priority only in respect of the materials furnished before the recording of the mortgage; as to subsequent work and materials the mortgage, as to the land, will have priority. Crandell v. Cooper, 62 Mo. 478; Taylor v. La Bar, 25 N. J. Eq. 222; Middleton Savings Bank v. Fellows, 42 Conn. 36; Conrad v. Starr, 50 Iowa 470; Jacobus v. Mut. Ben., etc., 27 N. J. Eq. 604.

S. U. E.

Query 22.—[No. 22, Vol. 22, Cent. L. J., p. 215.] A POINT UNDER THE MISSOURI HOMESTEAD LAW.—Mrs. A. is the owner in fee of eighty acres of land worth $800, which is used and occupied as a home, by her husband, A., and family, consisting, of Mrs. A., and two daughters, both of age. Mrs. A.'s deed has been recorded for ten years. In March, 1882, A., contracts debts—in June, 1882, Mrs. A. dies, leaving A., her husband, and her two daughters surviving her. Under the Missouri homestead law, is A.'s interest in this land exempt from sale as a homestead as to the debts contracted in March, 1882? If so why? Please cite authorities. I supposed that there was no doubt but that it was subject to execution until an eminent circuit judge of this State decided that it was not.

Answer.—It is true that by the general rule a homestead cannot be allowed against prior debts; but the reason is obvious, a fraud would be worked upon creditors if the debtor, after acquiring a standing for financial responsibility, could place his property beyond the reach of his creditors while he is permitted to continue in the enjoyment of it. In the case submitted, however, the acquisition of title and homestead were contemporaneous. A. acquired it as heir, without diverting a dollar of his estate in so doing, or depriving his creditors of any accessible fund. Realty was made liable for debts by statute, and homestead exemptions should be liberally construed. Thompson Homest'ds, §§ 2-4, 300-304.

LEX.

RECENT PUBLICATIONS.

THE AMERICAN REPORTS, containing all decisions of general interest decided in the courts of last resort of the several States, with notes and references, by Irving Browne, Vol. LII., containing all cases of general authority in the following Reports: 76 Alabama; 65 California; 52 Connecticut; 102 Indiana; 64 Iowa; 33 Kansas; 14 Lea; 77 Maine; 63 Maryland; 138 and 139 Massachusetts; 54 Michigan; 62 Mississippi; 82 Missouri; 17 Nebraska; 99 New York; 41 Ohio State; 107 Pennsylvania State; 57 Vermont; 79 Virginia; 25 West Virginia. Albany, N. Y. John D. Parsons, Jr., 1886.

This is another volume of a collection of reported cases, the reputation of which is well established and well deserved. The volume before us is in all respects equal to its predecessors, and reflects much credit upon the learned editor whose judgment and discrimination are conspicuously displayed in selecting the cases for publication, and excluding those of transient and local interest. The typographical execution of the work is excellent.

PARTIES TO MORTGAGE FORECLOSURES, and their rights and liabilities, in connection with actions and proceedings for the foreclosure of mortgages. By Charles H. Wiltsie, of the Rochester Bar. Rochester, N. Y. Williamson & Higbee, 1885.

This work treats of a small segment of a very large subject, but the theme of the author, though small, is very important. The foreclosure of a mortgage is the catastrophe, the denouement of the play, if so light a term may be applied to so grave a subject, and it is emphatically essential to the interest of the mortgagee, that it should be conducted in due form of law, and with all the solemnities necessary to make the transfer of title consequent upon it, effectual in law. It is above all things necessary that all parties having an interest in the estate should be made parties to the proceeding, and this book treating on that particular branch of the subject, touches the very point out of which controversies usually arise. The subject therefore is worthy of the attention it has received from the learned author, and of the volume in which he has embodied the results of his labors. His arrangement is very good, and his style lucid. He has treated his subject exhaustively, and produced a work which is worthy of a very favorable reception by the profession. On one point Mr. Wiltsie deserves especial commendation; he places the date of every case after its citation, a practice which should be universal with writers of textbooks. The year of the Lord is often the very essence of the value of an authority. We commend the book to the attention of all practitioners.

JETSAM AND FLOTSAM.

CONDITIONAL PARDON OF ONE WRONGFULLY CONVICTED.—The governor of Wisconsin, (it is said), recently pardoned a man under sentence of imprisonment for life. The pardon was granted because of convincing proof of his innocence of the crime of which he was convicted; but why the pardon should be coupled, as it was, with the condition that the convict should leave the State, it would be difficult to say, unless for the reason that it would be safer for the State to have a man, upon whom such a cruel wrong had been perpetrated outside of its border.—*Criminal Law Magazine.*

THE following joke has a faint flavor of antiquity. We give it, however, as testimony is often given, "for what it is worth:"

A thief having been tried and found guilty on a certain charge, cried out that great injustice had been done him. He saw among the jurors a man whose reputation for honesty had more than once been questioned.

"That may be true," calmly replied the judge, "and I will sentence you only on the opinion of the other eleven. I'll give you four years at hard labor."

Moral: There is no use in kicking a boy for calling you names, when all men are convinced that you are a rascal.—*Detroit Free Press.*

AND here is an old acquaintance that has come back to us from the ends of the earth. Has it improved by its travels? A woman was brought before a police magistrate and asked her age. She replied, "35." The magistrate.—"I have heard you have given that same age in this court for the last five years." The woman: —"No doubt, your honor. I'm not one of those females who say one thing to-day and another to-morrow.'"—*Australia Law Times.*

A DRAMATIC CONTROVERSY.—Actors and authors, like other people, when they go to law, get into "hot water:" Woolson Morse, a dramatic author, and Edward Holst, an actor, sued Michael B. Leavitt, in the Supreme Court, to restrain the production by him of the play "Hot Water," of which they are the authors. Leavitt, whose company are now producing the play in California, has failed to pay the $40 alleged royalty agreed upon. Mr. Leavitt gave a bond, signed by Tony Pastor and others, to pay the amount due in case the final decision was against him.—*N. Y. Daily Register.*

THE GOODWILL OF A BUSINESS.—Amongst the many kinds of property recognized by the law none perhaps is of greater interest to the owners than the goodwill of the business in which they happen to be engaged. Yet it is a subject about which some vague ideas prevail. In a recent case, Cotton, L. J. stated that "goodwill is a word of which few people understand the meaning." In ordinary speech it is, we think, generally understood to mean not the business itself, but the interest or connection which the owner of the business has established amongst his customers. It is, in short, the chance that the customers of a business will continue to deal with the persons who carry it on, or "the probability that the old customers will resort to the old place:" (per Lord Eldon in Cruttwell v. Lye, 17 Ves. 335, 346.) The sale of a business with its goodwill gives to the purchaser the benefit arising from the possession of the premises, and the stock-in-trade of the vendor, and the right of representing that his, is the old business: (Churton v. Douglas, Joh. 174.) For a long time it was believed that this was all the purchaser obtained, and that, in the absence of restrictive covenants, the vendor was at liberty to set up in the same business and in competition with the person to whom he had sold: (2 Davidson on Conveyancing, 4th edit. p. 651.) But this opinion did not commend itself to Lord Romilly, who laid down that the seller of a business with its good will was not at liberty to solicit the old customers either by letter, or personally, or by a traveller to continue their business with him and not to deal with the vendees: (Labouchere v. Dawson, L. Rep. 13 Eq. 332.) Before that decision it appears to have been held that the vendor had a right to solicit the old customers, but not to represent himself as carrying on the old business: (per Lord Hatherly, in Churton v. Douglas, *supra.*) The question on several occasions came before Jessel, M. R., who agreed with Lord Romilly: (Ginesi v. Cooper, 14 Ch. Div. 599; Leggot v. Barrett, 15 Ch. Div. 356.) This learned judge, indeed, extended the doctrine of Labouchere v. Dawson to a case where the goodwill had been sold, not by the trader himself, but by his trustee in bankruptcy. The Court of Appeal, however, held that the doctrine could not be extended to compulsory sale: (Walker v. Motram, 19 Ch. Div. 353.) That was the state of the law in 1881, and the law so remained until the recent decision in Pearson v. Pearson, (27 Ch. Div. 145), where the majority of the Court of Appeal dissented from Labouchere v. Dawson, and expressed an opinion to the effect that it had been wrongly decided. Pearson v. Pearson, however, can hardly be regarded as one that has finally determined the matter. For the agreement between the parties contains a proviso by which it was stipulated that nothing in the agreement should prevent the vendor from carrying on the like business when and where he pleased. The court were unanimous in holding that this proviso took the case out of the authority of Labouchere v. Dawson, even assuming that case to have been rightly decided. It, therefore, does not seem to have been necessary in that case for the court to have come to any conclusion as to the correctness or incorrectness of Labouchere v. Dawson, and the expressions of dissent are in the nature of *obiter dicta.* On the one side are Cotton and Baggallay, L. JJ., and on the other are Jessel, M. R. and Lindley, L. J., the latter upholding and the former dissenting from Labouchere v. Dawson.

The goodwill of a business which consists of the chance that persons will resort to the old place of business will, of course, when the business is mortgaged, pass to the mortgagee: (Chissum v. Dewes, 5 Russ. 29.) Thus, there may be a well-known public-house or hotel, which, from its position, being well-known and convenient, people are in the habit of frequenting. In such a case the goodwill attaches to the house and adds to its value, and accordingly, if the house be mortgaged, the goodwill becomes part of the security of the mortgagee. But there may be other kinds of goodwill; for example, the goodwill that attaches to the personal reputation which a man has made for himself. Of course, that could not go to a mortgagee, but would be the personal and inalienable property of the person whose skill and whose reputation have created it. (Cooper v. Metropolitan Board of Works, 25 Ch. Div. at 479.)—*Australian Law Times.*

THE *San Francisco Wasp* says a jury is "a number of persons appointed by a court to assist the attorneys in preventing law from degenerating into justice;" which is lucky for the newspapers.—*Albany Law Journal.*

One of the most characteristic remarks ever heard from a Welsh witness was elicited in the course of a recent trial. The witness, after answering a question in chief, blandly inquired of the examining counsel, "Have I said right?"—*Irish Law Times.*